THE LAW

OF

AUTOMOBILES

SECOND EDITION

BY

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First Edition.

TO

MY WIFE

WHO IS

MY GREATEST AND WISEST COUNSELOR.

PREFACE.

FIRST EDITION.

The appearance of a new means of transportation—the automobile—on the public streets and highways is creating a far-reaching influence, not only on industry and commerce, but also on legislation. The attention of legislative bodies has been taken by the twentieth century conveyance to such an extent that there now exists much important statutory law concerning automobiles and their operation, as will be seen from the pages of this book.

The legislation in the United States concerning motoring is not, however, all of a serious character. The various statutory provisions are exceedingly interesting from many points of view. Some of the provisions are really amusing. Thus, the legislature of Kansas has shown its kindly feeling towards motoring by actually incorporating into its legislation a provision regulating the operation of automobiles which is worth twice reading, as follows:

> "Nothing in this section shall be construed as in any way preventing, obstructing, impeding, embarrassing or in any other manner or form infringing upon the prerogative of any political chauffeur to run an automobilious band-wagon at any rate he sees fit, compatible with the safety of the occupants thereof; provided, however, that not less than ten nor more than twenty ropes be allowed at all times to trail behind this vehicle when in motion, in order to permit those who have been so fortunate as to escape with their

political lives, an opportunity to be dragged to death; and provided further, that whenever a mangled and bleeding political corpse implores for mercy, the driver of the vehicle shall, in accordance with the provisions of this bill, 'throw out the life-line.'" (See Kan. Laws of 1903, ch. 67, p. 113.) Kansas is, no doubt, on the right road.

Not only have the law-making bodies enacted laws in reference to the motor car and automobiling, but the reported judicial decisions of the highest courts of record and other courts in many jurisdictions are multiplying, and have accumulated to such an extent that many questions of vital importance have been decided.

Very true, many of the cases merely have called for the application of established rules of law, in dealing with the motor vehicle; but there have been decided numerous points of special application to the automobile and its operation on the public avenues of travel, of which the up-to-date layman, lawyer, and judge should be cognizant if he is to keep abreast with the progress of scientific inventions which are bound to figure in litigation and to occupy a prominent place in our jurisprudence. That there existed a necessity for a collection of all the law, both statutory and that announced by the courts in an accessible convenient form, is undoubted.

The encouragement given to the author in his undertaking to compile this work by gentlemen prominently interested in automobiling has strengthened his belief that a work of this kind will be welcomed.

Many branches of the law are being affected by the horseless carriage figuring in litigation. Where the automobile's permeating influence will stop is beyond prophesy. It is certain, however, that the motor car, including everything connected with it, is bound to be the subject of a vast

amount of litigation in the future and legal literature will justly devote much space to this new and most useful means of transportation. The motor carriage has already brought to us new terms and new ideas.

This book is compiled for the use of the layman, lawyer, and judge. Its purpose is to present all the legal information on the subject that exists, including a consideration of all the reported judicial decisions in America and England, which have decided questions pertaining to the automobile and its operation.

The work also treats of those principles and rules of law closely allied to the operation of automobiles and which concern subjects other than the motor carriage, such, for example, as the law of the road as applied to vehicles generally.

An accurate compilation of all the state automobile laws in the United States, and also the English Motor Car Act, are to be found in PART TWO of the work.

With the hope that this work may prove of assistance to those interested in the automobile, the author respectfully submits it for the consideration of the layman and the legal profession.

X. P. H.

NEW YORK CITY, *June* 1, 1906.

Second Edition.

TO

MY WIFE.

PREFACE.

SECOND EDITION.

It is with pleasure and some little pride that the author presents the second edition of this work to the public.

Since the publication of the first edition of this book, the law concerning the subject has developed to a marked extent. Numerous interesting and important questions have been set at rest by the courts of highest resort, and a large amount of legislation governing automobiling has been enacted. The necessity for the writing of a second edition exists because of the increased number of decisions of the courts and the urgent need of having the law as developed and established available for use in litigation. The first edition was so well received that it is a gratification to feel that the present edition will be welcomed with more enthusiasm, since it is considered by the author a far more valuable and useful work, and is not in any sense an experiment.

Two striking and important principles of law concerning the motor vehicle have been established since the first edition appeared.

The first and most important is that the automobile is not an agency dangerous *per se* and to be classed with combustibles, explosives, inflammable substances, fire arms, vicious animals and the like. All of the courts of highest resort before which this question has arisen have been harmonious in their decisions supporting this view.

The second important question which has been settled is that the owner of an automobile is not liable for the acts of another to whom he has loaned his machine, and the owner is likewise not responsible for the acts of his chauffeur who commits an injury when driving for himself, even though the employer permitted the chauffeur to use the motor vehicle. This last ruling has gone almost to the limit.

As stated in the first edition, this work is written for the judge, lawyer and layman, and it is the author's intention and purpose to make the book not only valuable as a text-book on the law relating to the subject, but to make it interesting reading. The Court of Appeals of Georgia, in deciding that the automobile is not an agency or a machine dangerous *per se,* says:

> "It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless."

> "While by reason of the rate of pay allotted to the judges in this State, few, if any, have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go, that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil disposed mules and the like."—Lewis v. Amorous, 59 S. E. Rep. 338.

The Court of Appeals of Georgia speaking through Mr. Justice Powell is both right and wrong in the above assertions. That the automobile is not dangerous *per se* is correct, but the intimation that the modern motor vehicle is not a success as a road vehicle is erroneous, since the automobile has already proven to be a practical vehicle. The incorrect statement was not made seriously. The author desires to thank the *Horseless Age,* for the valuable assistance rendered in the compilation of this work. The *Law of Automobiles* is fast assuming a position of importance equal to the law governing the operation of street and other railroads. Its field is much broader than these and its development will be of greater magnitude.

X. P. H.

New York City, *April* 1, 1909.

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THE LAW OF AUTOMOBILES.

SECOND EDITION.

CHAPTER I.

DEFINITIONS AND GENERAL CONSIDERATIONS.

§ 1. Definitions in general.

The term automobile is the generic name which has been adopted by popular approval for all forms of self-propelling vehicles for use upon highways and streets for general freight and passenger service. This definition should not include such self-propelled machines as steam road rollers or traction engines designed for hauling loaded trucks or vans in trains, nor such vehicles as require tracks for operation.[1] The meaning of the word automobile is, con-

1. **"Automobile" defined.**—The New International Encyclopedia, vol. II., pp. 271, 272.

A hybrid adjective—substantive (from Greek auto, stem of autos, "self," and Latin mobilis, "movable"), adopted as a generic term for self-propelled vehicles adapted to run and be steered on common roads and to carry either articles or passengers other than exclusively for their own use or guidance. The word is quite commonly abbreviated to "auto" simply; while a devotee of the new

taining means of propulsion within itself; self-propelling;

mode of locomotion is very frequently styled an "autoist." It is sometimes employed also in its original adjective sense of "self-movable" to form self-explaining compounds, such as "automobile boat," and the like. Int. Motor Cyc. p. 37.

Primarily the word means a vehicle designed mainly for transportation of persons on highways, equipped with an internal combustion, hydrocarbon-vapor engine, which furnishes the motive power and forms a structural portion of the vehicle. Secondarily, it is used as synonymous with "motor vehicle," denoting a vehicle moved by inanimate power of any description, generated or stored within it, and intended for the transportation of either goods or persons on common highways. Americana.

Traction engine included under New Hampshire law.—Emerson Troy Granite Co. v. Pearson, (N. H. 1906) 64 Atl. 582.

"An automobile is not a work of art, nor a machine about which there can be any very peculiar fancy or taste but it is not a common, gross thing, like a road-wagon or an ox-cart." Walker v. Brout Bros. Automobile Co., 124 Mo. App. 628, 642, 102 S. W. 25.

Automobilism.—The science which treats of automobiles and their structure, operation and applications, and of other matters pertaining directly and indirectly thereto. Int. Motor Cyc. p. 45.

Washing automobile—domestic use of water.—Water supplied to and used by a man for washing a motor car and for other purposes in connection therewith, the motor car being used by him for the purpose of his profession or the business of a physician and surgeon, is water supplied for domestic purposes within the meaning of English Waterworks Law. Harrogate Corporation v. MacKay, Vol. 2, L. Rep., K. B. Div. 1907.

Automobiles as household effects.—See Hillhouse v. U. S. 152 Fed. Rep. 163. A decision was rendered by the United States Circuit Court of Appeals on January 14, 1909, holding that American owners of foreign touring cars returning to this country must pay duty upon their machines. The court's decision reverses the judgment of the lower courts and the action of the General Appraisers. It was rendered in a case involving the importation of an automobile which had been repaired abroad. The practice has been to admit the automobiles of returning tourists free of duty as household effects. The court held that the judgment of the lower court that only the repaired part should pay duty was an error, and added that the automobile could only be considered an entirety. The decision held that an automobile is not a household effect within the meaning of the law.

as automobile car—an automobile vehicle or mechanism.[2]

The term "auto" is an abbreviation of the word automobile, used as a prefix with the meaning of self-moving, self-propelling; as an autocar, an autocarriage, an autotruck, etc., an automobile car, carriage, truck, etc.[3]

The term "car" is a common and popular expression designating the automobile, and when used in connection with other words of a written instrument, for example, which make it apparent what is referred to, there can be no question as to the interpretation. The automobile is probably more often spoken of as a "car," than otherwise. Such a use of the word has made its application to the automobile correct and the courts are bound to take judicial notice of the custom. The terms "machine" and "motor car" are also frequently heard.[4]

The expression "motor car" in the English Motor Car Act of 1903, means the same as the expression "light locomotive" in the principal act as amended by the 1903 act, except that, for the purpose of the provisions of the law of 1903 with respect to the registration of motor cars, the

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2. Means of propulsion within itself.—Web. Int. Dict., Supp., p. 19.

The term means "self-propelling; self-moving; applied especially to motor vehicles, such as carriages and cycles of those types usually or formerly propelled by horses or men. An autocar or horseless carriage." Standard Dict. Addenda.

3. Auto.—Web. Int. Dict., Supp., p. 19.

Auto truck.—It is said that an auto truck is a self-propelling or self-moving truck adapted for heavy grades. Standard Dict. Addenda. The term is more accurately applied to automobiles used for commercial purposes and the hauling of heavy loads.

4. Car.—A general term for a vehicle of a type which, when horse-drawn, is called a "carriage." Int. Motor Cyc. p. 97.

An autocar may be said to be an automobile vehicle especially for street travel. Standard Dict. Addenda.

term "motor car" does not include a vehicle drawn by an automobile.[5]

The term "motor" is commonly used to designate the automobile as a whole, and the word "motoring" is also in common use as meaning operating or driving a motor vehicle. However, unless the contrary appears, the term "motor" may have a more limited application. Thus the word "motor" in a statute empowering street railways, with the consent of the municipal authorities, to use electric or chemical motors as a propelling power of their cars, was construed to mean the motion-producing contrivance of the car, and not to embrace the entire car, though the word is sometimes loosely used to designate a whole car.[6]

"Automobile line," "stage line," "railroad line" are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points, or between different cities, and do not include hacks, stages, and automobiles which merely operate from point to point in one city for the transportation of the public.[7]

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5. **Meaning of "motor car" in English statute.**—See Sec. 20, Subd. (1), Eng. Motor Car Act. 1903.

6. **"Motor"**—State v. Inhabitants of City of Trenton, 54 N. J. Law (25 Vroom) 92, 23 Atl. Rep. 281.

The word "motor" means a machine for transforming natural energy in various forms into mechanical work, the term in the modern sense embracing windmills, water-wheels and turbines, steam engines, and steam turbines, the various kind of gas engines, compressed-air motors, petroleum motors, electric motors, etc. Steam, hot air, gas, and petroleum motors together constitute the group of thermic motors, because in all of them the source of energy is heat. The Encyclopedia America, vol. X.

Various kinds of motors defined.—See Int. Motor Cyc. p. 327.

An automotor is a self-propelled machine (Standard Dict. Addenda), and an automobile (Webster Int. Dict. Suppl.).

7. **Automobile line, stage line, etc.**—Com. v. Walton, 104 S. W. Rep. 323, 31 Ky. L. Rep. 916.

An automobilist may be said to be one who rides in, or drives an automobile.[8]

Extrinsic evidence as to the meaning of the various terms employed to designate the automobile would be admissible as explanatory of the language of any particular instrument or writing. In pleadings, however, especially in criminal proceedings, particular care should be exercised in using the proper and correct terms, especially where the definitions are to be found in a statute, which should be followed in the language of the act.

§ 2. Legal definitions.

The automobile, or self-moving carriage, has not as yet been judicially defined except that it has been declared to be a carriage, though the courts have said more or less in describing the motor carriage. The only definition which the author has been able to find in any of the law books is that in a law dictionary, which states that the term means, "All motor traction vehicles capable of being propelled on ordinary roads. Specifically horseless carriages."[9]

§ 3. Definitions in automobile legislation.

Fearing that disputes in the future might arise concerning the meaning of the terms employed in automobile legislation to designate the automobile, in many of the States the terms "motor vehicle," "automobile," "motor car," and "motor cycle," have been expressly defined by the

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8. Automobilist.—Standard Dict. Addenda.

A person conversant with the structure and mechanism of an automobile, and who is experienced in driving it. Int. Motor Cyc. p. 45.

9. Legal definitions.—See English's Law Dict., p. 78.

This definition was approved in Diocese of Trenton v. Toman, 70 Atl. Rep. 606.

legislatures. Thus it is commonly provided that the term "motor vehicle" shall include all vehicles propelled by any power other than muscular, except road rollers, fire engines, traction engines, and such vehicles as run only upon rails or tracks. Cars of electric and steam railways are specifically excepted from the operation of the statutes and so are bicycles, tricycles, or such other vehicles propelled exclusively, or in part, by muscular pedal power. The term "motor vehicle" as used in legislation means motor vehicles having more than two wheels ordinarily. Automobile fire engines and such self-propelling vehicles as are used neither for the conveyance of persons for hire, pleasure, or business, nor for the transportation of freight are excepted from the provisions of some of the enactments.

In the automobile law of *Virginia* the term "machine" is used to designate the automobile.[10]

Does "motor vehicle" include "motor cycle"? Whether the term "motor vehicle," when used in automobile legislation, includes the "motor cycle," may not be clear. Of course, if the term "motor cycle" is expressly defined in the law, as is the case in several of the States, then there should be little question concerning the construction of the statutory definitions, but, where motor cycles are required to conform to the automobile law by the public authorities who rely solely upon the term "motor vehicle" as including the "motor cycle," then it would seem that it

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10. Machine.—An assemblage of inter-related movable parts, forming an appliance for transmitting and modifying forces and the motion produced by them. A force employed to move a machine is a "motor." The moving force in a machine is called the "power." The place of its appliance is the "point of application;" the line in which such point tends to move is the "direction of the power;" the resistance to be overcome, the "weight;" and that part of the machine immediately applied to the resistance, the "working point." Int. Motor Cyc. p. 295.

is stretching a point to include "motor cycles" within the provisions of an act which purports to regulate the four-wheeled vehicle which is commonly called an automobile, although, it must be conceded, that, generally speaking, a "motor cycle" is a "motor vehicle." [1]

A traction engine is an automobile within the meaning and construction of the *New Hampshire* automobile law which provides that the terms "automobile" and "motor cycle" shall include all vehicles propelled by other than muscular power, except railroad and railway cars and motor vehicles running only upon rails or tracks and road rollers.[2]

Traction engines are usually excluded from the definitions of the terms "automobile" and "motor vehicle," but in the *New Hampshire* law this was apparently overlooked. Automobile legislation should not include within its terms traction engines, since road machines or locomotives of this type are not of the same class as automobiles and cannot properly fit into the theory upon which motor vehicle statutes are enacted and warranted. Extreme care should be exercised in the framing of statutory definitions of an automobile law. All things should be included which properly come within the purpose and scope of the

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1. **Motor-cycle.**—A two-wheeled or sometimes three- or four-wheeled cycle driven by a motor and usually furnished with pedals. The motor drives the wheel by belt, chain or propeller shaft, or even directly by spur-wheels, and is usually started by the pedals or by a crank. There is usually but one speed, but sometimes two or three. Motor-cycles carry but one person, the driver, although some makes produce arrangements for carrying another on an auxiliary framing, or in a forward seat converting the motor-cycle into a tricycle. When furnished with four wheels it becomes a quadricycle or "quad." Int. Motor Cyc. p. 326.

2. **Traction engine is an automobile.**—Emerson Troy Granite Co. v. Pearson, (N. H. 1906) 64 Atl. 582.

law and all objects excluded which are foreign to the legitimate sphere of the enactment.

Meaning of the word "team."—In the law of the road of *Maine* it is provided that the word "team" includes all kinds of carriages on the public ways for persons and for property.[3]

§ 4. Automobile a vehicle.

There can be little doubt but that the automobile constitutes in law a vehicle, ordinarily speaking, and it comes within a definition stating that "a vehicle is a carriage moving on land, either on wheels or runners; a conveyance; that which is used as an instrument of conveyance or communication."[4]

In *Connecticut* it was provided by statute that the word "vehicle" whenever it occurred in the enactments regulating the use of vehicles on the highways should be construed to include bicycles, tricycles, and motor carriages.[5]

In *Ohio,* the word "vehicle" as used in the Revised

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3. Team.—See the statutes of *Maine* pertaining to the law of the road.

4. Automobile is a vehicle.—Davis v. Petrinovich, 112 Ala. 564, 21 So. Rep. 344, 36 L. R. A. 615 (quoting Cent. Dict.).

The automobile is a vehicle in common use for transporting both persons and merchandise upon the public ways, and its use is regulated by statute. Baker v. City of Fall River, (Mass. 1904) 72 N. E. Rep. 336.

The ordinances for the city of New York provide as follows: "Every wagon, carriage, omnibus, sleigh, pushcart, bicycle, tricycle, and other conveyance (except baby carriages), in whatever manner or by whatever force or power the same may be driven, ridden or propelled, which is or may be used for or adapted to pleasure riding or the transportation of passengers, baggage, or merchandise upon the street; and every draught and riding animal, whether driven, ridden or led, excepting that an animal or animals attached to any vehicle shall, with such vehicle, constitute one vehicle."

5. Connecticut statute.—Gen. Stat. Conn. 1902, sec. 2038.

Statutes, § 1536-100, includes all classes and kinds of conveyances, whether used for hire or not.[6]

The statutes of the *United States* provide that the word "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.[7]

In this connection it is of interest to note that according to a long line of decisions the term "vehicle" includes a bicycle, and it is very appropriately stated in a *Minnesota* case that the term "vehicle" includes a bicycle, the latter being used very excessively for convenience, recreation, pleasure, and business; and the riding of bicycles upon the public highway in the ordinary manner, as it is now done, is neither unlawful nor prohibited, as they cannot be banished because they were not ancient vehicles and used in the Garden of Eden by Adam and Eve.[8]

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6. Ohio statute.—Sterling v. Bowling Green, 5 C. C. (N. S.) 217, 16 Cir. Dec. 581.

7. United States statutes.—U. S. Comp. Stat. 1901, p. 4, sec. 4.

Automobile is a vehicle.—An automobile is a "vehicle" within the meaning of a statute using that term.

Gassenheimer v. Dist. of Columbia, 26 App. Cas. (D. C.) 557. But see Washington Electric Vehicle Transfer Co. v. Dist. of Columbia 19 App. Cas. (D. C.)

8. "Vehicle" includes bicycle.—Thompson v. Dodge, 58 Minn. 555, 60 N. W. Rep. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533.

That the term "vehicle" includes the bicycle, see Davis v. Petrinovich, 112 Ala. 564, 21 So. Rep. 344, 36 L. R. A. 615; Mercer v. Corbin, 117 Ind. 450, 20 N. E. Rep. 132, 134, 3 L. R. A. 221, 10 Am. St. Rep. 76; Holland v. Bartch, 120 Ind. 46, 22 N. E. Rep. 83, 85, 16 Am. St. Rep. 307; Roberts v. Parker, 117 Iowa 389, 90 N. W. Rep. 744, 57 L. R. A. 764, 94 Am. St. Rep. 316; Myers v. Hinds, 110 Mich. 300, 68 N. W. Rep. 156, 157, 33 L. R. A. 356, 64 Am. St. Rep. 345; Thompson v. Dodge, 58 Minn. 555, 60 N. W. Rep. 545, 546, 28 L. R. A. 608, 49 Am. St. Rep. 533; Gagnier v. City of Fargo, 11 N. D. 73, 88 N. W. Rep. 1030, 1031, 95 Am. St. Rep. 705; Lacy v. Winn, 4 Pa. Dist. Rep. 409, 412; State v. Collins, 16 R. I. 371, 17 Atl. Rep. 131; Laredo Electric & Ry. Co. v. Hamilton, 23 Tex. Civ. App. 480, 56

§ 5. Automobile a carriage.

There seems to be some question as to whether the term "carriage" may always and under all circumstances, include the modern vehicle of transportation. It has been emphatically laid down that an automobile is a carriage. Plainly, an automobile is a vehicle which can carry passengers or inanimate matter, and therefore, ordinarily speaking, it is a carriage.[9] But in distinguishing the automobile from the bicycle it should be mentioned that it has been held that a bicycle was not a carriage within the meaning of a *Massachusetts* statute requiring highways to be kept reasonably safe for carriages.[10]

Conflict in authorities.—It would naturally be supposed that there could be no question as to whether the automobile is or is not a "carriage." The motor vehicle is nothing more or less than a carriage with a motor attached and moved by mechanical power instead of by muscular power.

S. W. Rep. 998, 1000; Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. Rep. 883, 47 L. R. A. 294.

9. Automobile is a carriage.—Baker v. City of Fall River, (Mass. 1904) 72 N. E. Rep. 336; Com. v. Hawkins, 14 Pa. Dist. Rep. 502; Scranton v. Laurel Run Turnpike Co., 14 Luz. Leg. Rep. (Pa.) 97, Diocese of Trenton v. Toman, 70 Atl. Rep. 606, *Contra*, Doherty v. Town of Ayer, 83 N. E. Rep. 677.

The New York Highway Law provides that the term "carriage" shall be construed to include automobiles. Gen. Laws New York, vol. 2, sec. 162, p. 1639.

Motor bicycle is a "carriage."—The Divisional Court of England declared a motor bicycle to be a carriage (Lord Alverstone, C. J., Mills and Kennedy, JJ.) and that it comes within the English Inland Revenue Act, 1888, sec. 4, and an owner is liable to pay duty upon it as a carriage. O'Donoghue v. Moore, (S. J. 477; L. T. 35; T. 495) 23 Law Notes (Eng.) 171.

A bicycle may be considered a carriage.—Taylor v. Goodwin, 4 Q B. 228.

10. Bicycle not a carriage.—Richardson v. Danvers, 176 Mass. 413, 57 N. E. Rep. 688, 50 L. R. A. 127, 79 Am. St. Rep. 330. *Compare* Taylor v. Goodwin, 4 Q. B. 228.

We would, however, hesitate to call an ordinary old-fashioned horse-drawn vehicle a "car," although the automobile is frequently so designated.

The highest judicial authority tells us that an automobile may or may not be considered a carriage, according to the facts and circumstances surrounding the use of the word. Drivers of "carriages" are not allowed to do certain things. Are chauffeurs or automobile drivers included in the prohibition? Towns are compelled to keep their roads and highways in reasonably safe repair and condition for the safety of "carriages." This legal requirement was enacted a hundred years ago, long before automobiles were heard of. Must the avenues of travel be kept in a safe condition for automobile travel? The answer to the last question depends upon whether the term "carriages" shall be held to include automobiles. The Supreme Judicial Court of *Massachusetts* has held that automobiles are not carriages within the meaning of such a requirement as the last mentioned.[1]

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1. Automobile not a carriage.—Doherty v. Town of Ayer, 83 N. E. Rep. 677.

Author's note.—So far as the intention of the statute referred to is concerned the Massachusetts court is undoubtedly correct, but upon principle it would seem that in justice the automobile should be included within the statute of Massachusetts. The court in this case held further that though persons may lawfully travel over highways in automobiles, a town is not liable for a failure to make special provisions required only for their safety and convenience, if the roads are kept reasonably safe and convenient for travel generally. It may be asked, What is "travel generally"?

The general travel on our public highways to-day is largely composed of automobile travel, and it is somewhat questionable whether or not "travel generally" is not made up, to a larger extent, of the use of automobiles. If it is required of a municipality to keep its roads in a reasonably safe condition for travel generally, it certainly would seem that such a law would include the automobile. Unquestionably, the Massachusetts Court decided the question before it cor-

The decision of the *Massachusetts* court is not in harmony with the prevailing judicial opinion of authority on the subject. There have been many judicial expressions to the effect that an automobile is a carriage, and it is the common sense view to include in the term the new means of highway travel.

That the automobile is a "carriage" has been held by the *New Jersey* Court of Chancery, in the case of Diocese of Trenton v. Toman, 70 Atl. Rep., 606. The court in this case had before it a covenant in a deed reserving a strip of land for a carriageway forever. Vice-Chancellor Walker, in the court's opinion, says:

No particular kind of carriage or wagon is mentioned. Although automobiles had not been invented at the time the easement was created, yet the language of the grant is unrestricted, and must be held to include any vehicle on wheels then or *thereafter to be used.*

Here we find the courts of *New Jersey* and *Massachusetts* seemingly diametrically opposed, the latter courts holding that an automobile is not a carriage and the former that the term includes the automobile. The circumstances in each case were very similar. The term was used long before the invention of the motor vehicle, only in the *Massachusetts* case a State law was under consideration, while in *New Jersey* a covenant between two persons was being construed. The opinion of the New Jersey court further states as follows:

A case entirely in point, on principle, is that of Taylor v. Goodwin, 4 Q. B. 228, in which it was held that a

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rectly from a legal standpoint. However, to hold that an automobile is not a carriage within the meaning of the statute referred to is a somewhat narrow construction of the act, and the decision is not in all respects in harmony with a liberal interpretation, with a view to complete justice.

person riding a bicycle on a highway at such a pace as to be dangerous to the passers-by might be convicted of furiously driving a "carriage" under the Eng. St. 5 and 6 Wm. IV, C. 50, Sec. 72. Lush, J., concurring with Mellor, J., made the following observations: "The mischief intended to be guarded against was the propulsion of any vehicle so as to endanger the lives or limbs of the passers-by. It is quite immaterial what the motive power may be. Although bicycles were unknown when the act was passed, it is clear that the intention was to use words large enough to comprehend any kind of vehicles which might be propelled at such a speed as to be dangerous." Mr. Huddy, in his "Law of Automobiles" (page 6), speaking of the machines which he calls automobiles, or self-moving carriages, says that the only definition he has been able to find of them is that in English's Law Dic., p. 78, which states that the term means "all motor traction vehicles capable of being propelled on ordinary roads. Specifically, horseless carriages."

There probably is not so much real conflict of authority concerning whether an automobile may be considered a carriage within the meaning of a statute or writing, as would seem, for, after all, the particular construction of the term will depend upon the intention with which the word was used and the demands of justice, provided the interpretation is reasonable. Thus an English court decided that an automobile is not a carriage. A man in making his will left a choice of "carriages" to his wife, daughter and a son, in succession in his will. Later he bought two motor cars, and the question which arose on his death was as to whether in choosing a "carriage" the devisees could take a motor car. It was held that all the ingenuity of counsel had not been able to convince the court that the motor cars were included in the various bequests of "carriages" to

be chosen by the wife, and by the daughter, and "carriages not otherwise disposed of" to the son. Each of the devisees wanted a motor car, and each had a lawyer to show that a motor car was a "carriage," but the court sent the automobiles into the residue of the estate.[2]

"A pleasure carriage is one for the more easy, convenient, and comfortable transportation of persons,"[3] and the term "pleasure carriage," as used in an act establishing a turnpike, includes a one-horse wagon with a spring seat

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2. Automobile not a carriage or vehicle.—In the state of New York there is a law which makes it necessary for an owner of a vehicle propelled by steam to send ahead of the vehicle a person of mature age at least one-eighth of a mile in advance, who shall notify and warn persons of the approach of the vehicle. This law would seem to apply to an automobile propelled by steam, and, it might be suggested that if the prosecuting authorities wished to do so the owners and drivers of automobiles propelled by steam could be prosecuted under the provisions of this statute. Such a view, however, is erroneous, for it has been expressly held in Nason v. West, 31 Misc. (N. Y. 583), that the provisions of the highway law, Section 155, and of the Penal Code, Section 640, subdivision 11, do not apply to * * * automobiles, but are directed against the heavier traction engines; and the requirement that a forerunner must precede the steam carriage would have no value, and has no application." The New York statute is as follows: "The owner of a carriage, vehicle or engine, propelled by steam, his servant or agent, shall not allow, permit or use the same to pass over, through or upon any public highway or street, except upon railroad tracks, unless such owners, or their agents or servants, shall send before the same a person of mature age at least one-eighth of a mile in advance, who shall notify and warn persons traveling or using such highway or street, with horses or other domestic animals, of the approach of such carriage, vehicle or engine; and at night such person shall carry a red light, except in incorporated villages and cities. This section shall not apply to any carriage or motor vehicle propelled by steam developing less than 25 horse power, other than a steam traction engine."

3. Pleasure carriage.—Brendon v. Warley, 28 N. Y. Supp. 557, 8 Misc. Rep. 253.

and painted sides which is not used for farming purposes or for carrying goods.[4]

The automobile being a "pleasure carriage" may use a toll road or turnpike upon paying reasonable fees for the privilege.[5]

Under these definitions of the term "pleasure carriage" there seems to be no doubt as to whether a motor vehicle, which is used for the more easy, convenient, and comfortable transportation of persons, is a pleasure carriage. The term carriage, under a statute or ordinance, may refer only to vehicles as automobiles used for the conveyance of persons, and not those used in the transportation of property. Thus, where an ordinance provided that no one should keep or hire out carriages without license, it was held that carriages for persons only were meant.[6]

§ 6. Other definitions.

Definitions of other terms and words will be found in the subsequent chapters of this book concerning the particular subjects wherein the terms and words occur. Many of the expressions have not been passed upon by the courts. Some have. However, the importance of the meaning of a definition cannot be overestimated, since future controversies in automobile legislation hinging on the definition of a word or the meaning of a particular phrase, will be many. We have already seen that an automobile may be considered a "carriage" under certain circumstances and it is not a "carriage" under certain other circumstances.

The automobile has brought to us new words and

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4. "Pleasure carriage" includes what?—Moss v. Moore, 18 Johns. (N. Y.) 128.

5. Use of toll road or turnpike.—Scranton v. Laurel Run Turnpike Co., 14 Luz. Leg. Reg. Rep. 97.

6. Carriages for persons.—Snyder v. City of North Lawrence, 8 Kan. 82.

phrases. These are now in common and everyday use and sooner or later, the courts will be called upon to judicially define their meaning. Take, for example, the words "joy riding." This is a new expression, but the meaning conveyed is well understood, and to call a person a "joy rider" would constitute slander, provided the statement is false and the other elements of the tort exist.[7]

The words "ride" and "drive" are not confined to animals. They are not limited in any manner whatsoever. Anything capable of being ridden or driven comes within the purview of those terms. They are apt words in the case of bicycles, motorcycles or automobiles, when ridden or driven.[8]

Definitions of automobile parts and accessories may be of great importance in the construction and interpretation of contracts. What is and what is not included within the meaning of certain terms used by parties may be the subject of dispute. For example, an automobile body is ordered from a manufacturer or dealer, what is the purchaser entitled to receive? Take also the purchase of an automobile. What goes with it for the price named? Are lamps, searchlights, tools, speedometer, clock, wind shield, etc., to go with it, or are all or some of these articles to be treated as accessories and entailing extra expense. So far as lamps are concerned, it may be said that the automobile may be expected by the purchaser to be legally equipped for operation on the public highways, but this does not necessarily include extra searchlights. So also a horn or proper signal or warning device goes with the sale of an automobile without express mention. These

7. **Traveling** is defined as passing from place to place—the act of performing a journey; and a traveler is a person who travels. *Ex parte* Archy, 9 Cal. 164.

8. **"Ride" and "drive."**—State v. Smith, 69 Atl. Rep. 1061; State v. Thurston, 28 R. I. 265, 66 Alt. Rep. 580.

may be said to come properly within the meaning of the term automobile or other word used in the contract of purchase. Chains, however, to prevent skidding, a speedometer and a clock, would not ordinarily be included. Then again, it might be asked if a wheel includes the tire, or shoe and inner tube. In the case of the purchase of an ordinary wagon wheel, the metallic tire would necessarily be included, but in purchasing an automobile wheel, the shoe and inner tube might not be intended unless the intention of the parties to the contrary appears. Custom and usage in the trade would control of course in the absence of express contractual provisions. Robes, goggles, clocks, speedometers, chains and similar accessories are not parts of an automobile, though quite necessary in the use of motor vehicles.[9]

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9. **Engine.**—A piece of mechanism used to convert heat, or some other form of energy into mechanical work; in other words, a machine for the development of power from some source of energy, such as coal, gas, oil, etc. A gasolene engine is an internal combustion engine in which the fuel used is an inflammable vapor formed by a mixture of gasolene and air. Int. Motor Cyc. pp. 177 and 178.

Carburetter.—An apparatus in which is effected the mixing of the fuel necessary for the operation of internal combustion motors. Int. Motor Cyc. p. 98.

Chassis.—A term for the frame together with the power-plant and running gear, independently of the body of a motor-vehicle. In French it has come to mean all this, but originally it designated the frame only. Int. Motor Cyc. p. 111.

The frame is that part of a motor-vehicle which supports the carriage body, motor, and transmission, and to which, beneath, are attached the wheel-axles. Int. Motor Cyc. p. 197.

Transmission-gear.—The gearing through which the power from the motor in an automobile is transmitted to the rear axle. Int. Motor Cyc. p. 477.

Automobile engine not a brake.—Wilmott v. Southwell, L. T. Rep. vol. XXV, No. 2, p. 22, Oct. 27, 1908.

Replevin of automobile.—Pabst Brewing Co. v. Rapid Safety Filter Co., 107 N. Y. S. 163, 56 Misc. Rep. 445.

Fire originating "within" automobile—Insurance.—Preston v. Aetna Ins. Co., 193 N. Y. 142.

CHAPTER II.

HISTORICAL.

§ 1. Automobile vehicle of modern times.

The automobile is decidedly a vehicle of modern times. In 1899 there were but few automobiles in existence in the *United States,* while at the present time there are thousands of motor cars and the number is increasing from year to year. The modern automobile is a development of comparatively recent date, but its inception dates back to the early days of the steam engine. In 1680 Sir Isaac Newton proposed a steam carriage to be propelled by the reactive effect of a jet of steam issuing from a nozzle at the rear of the vehicle. In 1790 Nathan Read patented and constructed a model steam carriage in which two steam cyclinders operated racks running in pinions on the driving shaft. In 1769-1770 Nicholas Joseph Cugnot, a Frenchman, built two steam carriages. The larger of these is still preserved in Paris, and was designed for the transportation of artillery. Murdock, an assistant of James Watt, constructed a model carriage operated by a grasshopper engine, and in 1786 Oliver Evans, of the *United States,* suggested the use of steam road wagons to

the Lancaster Turnpike Company of Maryland. In 1802 Richard Trevitluck built a steam carriage, which was exhibited in London, having driven itself ninety miles from Camborne, where it was built, to London. This carriage brings us to the notable period of steam-coach construction in England, which lasted until 1836. From this time we have experienced periods of development of the automobile until it is in its present shape.[1]

§ 2. Development of motor carriage.

The successful displacement of animal power by mechanical devices is an old problem. The early records of achievement in this direction were so fragmentary and imperfect that the earliest conception of the idea is mysteriously hidden in the past. The application of the force of steam for propulsion on sea and land was anticipated by Roger Bacon when he wrote: "We will be able to construct machines which will propel large ships with greater speed than a whole garrison of rowers, and which will need only one pilot to direct them; we will be able to propel carriages with incredible speed without the assistance of any animal; and we will be able to make machines which by means of wings will enable us to fly into the air like birds." [2]

§ 3. Growth of law.

To study automobile legislation and the decisions of the courts concerning motor vehicles, one does not have to wade through centuries of musty reports, though such a process often is necessary in looking up a rule or principle of law applicable to the automobile or its operation on the public streets and highways. The legislative enactments

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1. **History of power vehicle.**—The New International Encyclopedia, vol. II., pp. 271, 272.

2. **Roger Bacon's writings.**—The Encyclopedia America, vol. II.

and judicial decisions in the *United States* do not extend far back. In *England,* however, Parliament has for some time regulated the operation of steam carriages and the act passed in 1896 was the parent of the amendatory act passed in 1903, known as the "Motor Car Act of 1903." In the *United States* in 1899 there were practically no cases decided concerning motor cars in the law reports, but from that time on until the present the increase of legislation and judicial decisions is very noticeable and marked; so that the conclusion is warranted that there has commenced a branch of the law which will devote much attention to the twentieth century conveyance.[3]

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3. See Law Notes, vol. IX., No. 8, 147.

Critical legislative period.—The history of legislation controlling automobile driving shows us that the regulation of automobiling started with few restrictions, and has gradually increased, until there are now many and numerous regulations in various States. We have arrived at the point where there must be a turn in the tide, either in one way or the other, calling forth either an increase or a decrease in the control over the subject. Particularly unfortunate is it that at this critical period the industry and automobilists should be face to face with many examples of reckless driving, disregard for the public safety, and a disposition of even automobilists themselves to incite the speed mania.

The daily newspapers are editorially advocating further restrictions. The railroads are devising means and ways of protecting automobilists against their own recklessness.

The automobile associations have manifested a desire and overeagerness to stop reckless driving and to comply with the spirit of the automobile laws. Meetings have been held between representatives of these organizations and county officials to devise ways and means for preventing disastrous and reckless driving. Committees of public safety have been appointed by certain clubs and statements have been issued to the public asserting the position which the automobilists take against speeding. All this has had a tendency to some extent to restore confidence in the public; but actions speak louder than words. Nothing material has been accomplished, and to-day a more critical situation has never faced automobiledom and the public.

§ 4. Law keeps up with improvement and progress.

"In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road." [4]

§ 5. Highways open to new uses.

"When the highway is not restricted in its dedication to some particular mode or use, it is open to all suitable

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It is utterly impossible to legislate evil out of existence. Accidents cannot be prevented by laws, neither can evil conduct. Conduct may, to a more or less extent, be regulated by statutory control, if the penalties are severe enough to provoke respect in the minds of those who would disobey the law. Various men throughout the country have suggested ways and means for doing away with evils connected with automobiling. Very comprehensive laws have been enacted, notably the one in the State of New Jersey, which, it must be confessed, is as good a law as any for all concerned, with the exception, perhaps, of its revenue features. The courts have in one or two rare instances given a jail sentence to drivers who have been guilty of speeding under aggravating circumstances, but it must be noted that there has been no decrease in the evil.

The time has come for automobilists themselves to take active steps in order to protect automobiling. Instead of asking special favors, for more lenient regulations and for the privilege of holding illegal speed contests on the public highways, they should be spending their time devising a method to regain the respect which they should have in the minds of the public, and to protect themselves against the evils which are now known to exist. Automobilists should be just as eager to have a violator of the law prosecuted and punished as the public officials are, and it would seem that the proper method to get at this is for automobilists themselves to maintain a prosecuting department which will be energetic and active.

4. Law keeps up with improvement and progress.—Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. Rep. 615, 1 L. R. A. (N. S.) 238.

methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them." [5]

§ 6. Tendencies in legislation.

The automobile legislation in the *United States* was originally framed upon the theory of regulation, in so far as registration requirements were concerned, but it is to be regretted that in some of the States, there has been a disposition to exact revenue from automobilists under the licensing power of the government. The revenue features of the automobile laws are clearly unauthorized, since the police powers of the States do not permit taxation beyond a reasonable limit. Moreover the right of transit from State to State cannot be taxed.[6]

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5. **Highways open to new uses.**—Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. Rep. 615, 1 L. R. A. (U. S.) 238; Nason v. West, 31 Misc. (N Y.) 583, 65 N. Y. Supp. 651; Towle v. Morse, 68 Atl. Rep. 1044; McIntyre v. Orner, 166 Ind. 57; Carter v. Northwestern Tel. Exch., 60 Minn. 539; Carli v. Stillwater St. Ry. & Transfer Co., 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. Rep. 205.

Any method of travel may be adopted by individual members of the public which is an ordinary method of locomotion or even an extraordinary method, if it is not of itself calculated to prevent a reasonably safe use of the streets by others. Chicago v. Banker, 112 Ill. App. 94.

6. **Transit cannot be taxed.**—Crandall v. Nevada, 6 Wall. (U. S.) 35.

The right of transit through each state, with every species of property known to the Constitution of the United States, and

The *New York* motor vehicle law of 1904 has been widely copied throughout the Union. This statute has, however, proven to be inadequate and in all probability changes will be made in the legislation very soon. The simpler an automobile law is the better, provided it accomplishes its legitimate purposes; therefore there has been in the past much hesitation in amending the *New York* enactment for fear that a fairly good law would be spoiled.

Effort has been made to persuade Congress to enact a Federal automobile registration law on the theory that interstate travel for pleasure constitutes interstate commerce. This has failed. It is doubted that interstate automobile travel constitutes interstate commerce, but it is suggested that such a measure might be within the domain of Congress if framed upon the theory of protecting the interstate commerce actually carried on over interstate highways.

The latest development in motor vehicle legislation is the appearance of a movement to have enacted uniform automobile laws in the various States. Uniform automobile laws would greatly facilitate interstate touring and commercial travel, but it is hardly possible to have many States enact the same kind of a motor vehicle law since conditions are different in the different jurisdictions. Moreover, the registration or license fees adequate for one State would under certain conditions, due to the number

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recognized by that paramount law, is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. *Ex parte* Archy, 9 Cal. 147. In this case the court asks, "is not this right of transit across the territory of a sister State one of the necessary incidents of the purposes and ends for which the federal government was created?" (See page 162.) The following cases are cited by the court. Lydia v. Rankin, 2 A. K. Marsh (Ky.) 820; Willard v. People, 4 Scam. Rep. 461; Julia v. McKinney, 3 Mo. 272.

of automobiles and the location of the State, be insufficient for another State. Precise uniformity in automobile legislation throughout the *United States* will be utterly impossible.[7]

§ 7. Tendencies in judicial decisions.

That the courts reflect public sentiment is well known. This is as it should be, provided no positive rule of law is warped or violated, since public sentiment is most always right. However, the courts should not blind their eyes to reason, and, merely because there happens to be some local and temporary public agitation concerning the automobile due to an automobile collision, for example, manifest the slightest prejudice against the automobilist. All the courts of the *United States* before whom the question as to whether the automobile is an agency dangerous *per se*, have emphatically held that it is not *per se* dangerous. The

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7. The abolition of arbitrary speed limitations.—The state of *Connecticut* has abolished specific maximum speed limits for automobiles, and has, by legislative enactment, made it a matter of personal responsibility on the part of the automobilist to drive safely, making, however, a speed of over 25 miles an hour for a certain distance *prima facie* evidence of dangerous driving. Automobilists and automobile clubs throughout the United States have maintained that it is unfair to motorists for the State to prescribe arbitrary speed limits, since it is a very difficult matter to say just how fast an automobile should travel under all circumstances. There is much truth in this claim, but it is not the careful driver who necessitates the enactment of speed regulations. Legislation limiting speed is prompted by reckless automobiling, which in almost all cases consists in driving at a dangerous rate of speed. The State is compelled to control reckless drivers in order to protect all the users of the highway. We will watch with much interest the working of the *Connecticut law*. It is too early now to say what may be expected from the abolishment of specific speed limits; but before other States follow the example of Connecticut, it would be well to study the benefits and detriments resulting from the operation of that commonwealth's legislation.

Appellate Division of the Supreme Court of *New York* has declared that the automobile is no more dangerous *per se* than a carriage. The sound judicial tendency has been to enlarge the motorist's rights consistent with the safety of the public.

CHAPTER III.

NATURE AND STATUS OF AUTOMOBILE.

§ 1. Automobile not a machine only.

The automobile is something more than a mere machine. The mechanical part of the motor vehicle is only a substitute for animal power. Aside from its novel method of propulsion and guidance, the automobile is not substantially different from any other ordinary vehicle which travels on the public ways. However, it possesses many characteristics which take it out of the category of the older means of transportation, as will be seen later on. As has been said before, it is a carriage, and a vehicle, and not only is it a most efficient means of transportation, but it constitutes a most useful mode of road traveling either for pleasure or profit. It is hardly necessary to mention that an automobile is personal property, and the fact that it is property, affords to the owner the protection of constitutional provisions, both State and Federal, relating to taxation and interstate transit.[1]

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1. **Not a machine merely.**—See Baker v. City of Fall River, (Mass. 1905) 72 N. E. Rep. 336.

Not a work of art.—The nature of an automobile was con-

§ 2. Automobile not a dangerous machine.

It is believed to be a common opinion among many that the automobile constitutes a dangerous machine, and that the operation of the motor vehicle on the public thoroughfares is necessarily hazardous. This is a mistaken view. The motor carriage is not to be classed with railroads, which, owing to their peculiar and dangerous character, are subject to legislation imposing many obligations on them which attach to no others.[2] Certainly a motor vehicle is not a machine of danger when controlled by an

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sidered in the case of Walker v. Grant Bros. Automobile Co., 124 Mo. App., 628, and the Court says:—

"An automobile is not a work of art, nor a machine about which there can be any very peculiar fancy or taste, but it is not a common, gross thing, like a road-wagon or an ox-cart."

The decision in this case had to do with the rights of a purchaser of an automobile, where the manufacturer agreed that the automobile would be "satisfactory" to the purchaser. The Court held that in case the purchaser is dissatisfied under such an agreement, the machine may be returned and the price recovered back, no matter if the purchaser's dissatisfaction is unreasonable or groundless.

The right of transit through each State with every species of property known to the Constitution of the United States, and recognized by that paramount law, is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity.—*Ex parte* Archy, 9 Cal. 147.

In this case the court asks, "Is not this right of transit across the territory of a sister State one of the necessary incidents of the purposes and ends for which the Federal Government was created?" The following cases are cited by the court: Lydia v. Rankin, 2 A. K. Marsh (Ky.) 820; Willard v. People, 4 Scam. Rep. 461; Julia v. McKinney, 3 Mo. 272.

The principal case cited here is in line with the decision in Crandall v. Nevada, 6 Wall (U. S.) 35. The bearing which these decisions have on the right of the Federal Government to regulate interstate automobile travel is of the utmost importance. Interstate transit can no more be taxed than interstate commerce.

2. Railroad legislation.—Jones v. Hoge, 92 Pac. Rep. 433; Baldwin on American Railroad Law, p. 217.

intelligent, prudent driver. The hazard in many cases to which the safety of the public may be exposed, results from the personal part played in motoring, rather than from the nature of the vehicle. (Lewis v. Amorous, (Ga. App. 1907) 59 S. E. Rep. 338). It is evident, therefore, that it is in the manner of driving the vehicle, and that alone, which threatens the safety of the public. The ability immediately to stop, its quick response to guidance, its unconfined sphere of action, would seem to make the automobile one of the least dangerous of conveyances.[3]

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3. Dangerous characteristics.—McIntyre v. Orner, 166 Ind. 57, 76 N. E. Rep. 750, 4 L. R. A. (U. S.) 1130. See Yale Law Journal, Dec. 1905.

"**The danger of rapidly moving machinery** calls for the exercise of care on the part of its owner to avoid damage to persons lawfully near it. . . . To the person injured, however, such machinery is suggestive of danger, and he must exercise remarkable care accordingly. And disregard of such danger . . . is contributory negligence sufficient to bar recovery. Jaggard on Torts, vol. II., pp. 862, 863.

A motor car, like a carriage and pair, is in itself harmless enough; but if the carriage is driven in a crowded thoroughfare at the utmost speed that can be got out of the two horses, it becomes to all intents as dangerous a vehicle, and as much an instrument of terror, as a motor car would be when driven without any consideration or regard for the safety of the persons in the thoroughfare. The gravamen of the indictment against motorists as a class is that a large proportion of the individuals composing that class habitually drive their motor cars, whether intentionally or inadvertently, with a total disregard for the safety or comfort of other persons using the road. That such an evil exists and that active means should be taken to secure its immediate diminution or suppression cannot be denied. The proper adjustment of the respective rights of persons owning and traveling in motor cars and of persons lawfully using the highways and public roads is the serious problem calling for solution. These two sections of the public each have definite legal rights, though there seems to be as yet a very indefinite conception of the nature of such rights. The Justice of the Peace, vol. LXIX., No. 39, p. 458.

"**A car with a defective brake** is not such an immediately

Not dangerous per se.—That the courts have refused to stamp the automobile as an inherently dangerous machine, should be stated at the outset. To use legal phraseology, the motor vehicle is not considered in law as dangerous *per se*. The fact that it has been judicially established that the automobile is not inherently dangerous, is of the greatest importance to automobilists and the automobile industry of the United States, since a limit has now been placed upon the character of motor vehicle legislation which may constitutionally be enacted.

The Court of Appeals of *Georgia,* in the case of Lewis v. Amorous, 59 S. E. Rep., 338, says, concerning the dangerous character of automobiles:—

"It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of the automobile that is to be feared, but the ferocity of those who drive them. Until human agency interferes they are usually harmless. While by reason of the rate of pay allotted to the judges of this State, few, if any, have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, there-

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dangerous instrument as to render a railroad company liable to any one injured thereby, in the absence of contract or other relation." Jaggard on Torts, vol. II., p. 859.

A bicycle is in itself an innocent vehicle. It is entitled to the rights of the road (but not of the sidewalk) equally with a carriage or other vehicle; and, if it is going at such a rate of speed as to frighten horses, there is liability on the part of the rider only when his want of care can be shown. Carriages and other vehicles drawn by horses become dangerous because of the motion given to them, and because of the tendency of horses to run away and otherwise do damage. Jaggard on Torts, vol. II. p. 859.

No more dangerous than horse and carriage.—Cunningham v. Castle, 127 N. Y. App. Div. 580, 111 N. Y. Supp. 1057.

fore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like."

The Supreme Court of *Washington,* in the recent case of Jones v. Hoge, 92 Pac. Rep., 433, says, concerning the automobile's legal status:—

"We do not believe that the automobile can be placed in the same category as locomotives, gunpowder, dynamite, and similarly dangerous machines and agencies. It is true that the operation of these machines is attended with some dangers not common to the use of ordinary vehicles, and we believe, and have already held, that those who operate these machines must be held to that degree of care which is commensurate with the dangers naturally incident to their use."

The courts of the various States of the United States have been very free in discussing the motor car's position in the law, but the two cases above quoted are the leading and most important of all the legal decisions concerning the automobile or its operation, with the exception of the leading case of Cunningham v. Castle, decided by the Appellate Division of the Supreme Court of *New York,* (127 N. Y. App. Div. 580), which held that the automobile is not a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous than a team of horses and a carriage, or a gun, or a sail-boat, or a motor launch.

Again, in the case of McIntyre v. Orner, 166 Ind., 57, the Supreme Court of *Indiana* says:—

"There is nothing dangerous in the use of an automobile when managed by an intelligent and prudent driver. Its guidance, its speed, and its noise are all subject to quick

and easy regulation, and under the control of a competent and considerate manager it is as harmless, or may soon become as harmless, on the road, as other vehicles in common use. It is the manner of driving an automobile on the highway, too often indulged in by thoughtless pleasure seekers and for the exploitation of a machine, that constitutes a menace to public safety."

Automobiles and horse vehicles compared.— In Watts v. Stroudsburg Passenger Railway Company, 34 Penn. Co. Ct., Rep. 377, the Court compares automobiles and horse-drawn vehicles as follows:—The use and operation of the ordinary vehicle drawn by a horse, or horses, has been known for so many years that every man is charged with knowledge as to the movement of such and the ordinary speed, and, therefore, a horse or horses and wagon happening to be on the track of an electric railway, the motorman on an electric car is bound by the knowledge of how fast the horse, or horses, can, or will, ordinarily travel, and he must operate and control his car with that fact taken into consideration.

The movement of an automobile has no such certainty. The movement of the ordinary horse is from a slow walk of about 2 miles an hour to a trot or pace of probably from 6 to 10 miles an hour, the latter speed very rarely, however, being reached when a horse is traveling between the tracks of an electric railway company.

The speed or movement of an automobile is anywhere from a few miles an hour to anywhere between 12 and 30 miles an hour. It is within common experience that they glide off and in tracks, run behind electric cars and then turn off the track, run around the cars and run on the track again and easily keep ahead of a car moving at an ordinary speed, and, when occasion requires, they easily move at a rate of speed which the trolley does not often obtain.

The ordinary man knows that it is not easy for a person to get out of an electric railway track with a horse and wagon, nor can it be accomplished, ordinarily, quickly. The horse cannot move fast over the tracks, and the wheels of the wagon are apt to slide; and it is also within the common knowledge of people living in communities where automobiles are used that they can easily turn in and out of electric railway tracks and do it quickly.

How is the automobilist considered by the courts? it may be asked. Is he to be looked upon invariably as a speed maniac? A violator of the rights of the people on the public highways? After being convicted of speeding, a criminal? As between the inanimate chattel, the automobile, and the automobilist, the latter constitutes the only proper subject of legal regulation, and only when he does not do right.

"It is the manner of driving an automobile on the highway, too often indulged in by thoughtless pleasure seekers and for the exploitation of a machine, that constitutes a menace to public safety," says the Supreme Court of *Indiana,* in McIntyre v. Orner, 166 Ind., 57.

"Until human agency intervenes they are usually harmless," says the Court of Appeals of *Georgia,* in Lewis v. Amorous, 59 S. E. Rep., 340.

Adverse judicial statements made by the courts apparently condemning the automobile have not been infrequent. Thus, the Supreme Court of *Illinois* has stated that it is a matter of common knowledge that an automobile is likely to frighten horses. It is propelled by a power within itself, is of unusual shape, is capable of a high rate of speed, and produces a puffing noise when in motion. All this makes such a horseless vehicle a source of danger to pedestrians and persons traveling on the highway in

vehicles drawn by horses.[4] The Supreme Judicial Court of *Massachusetts* has declared that automobiles are capable of being driven, and are apt to be driven, at such a high rate of speed, and when not properly driven are so dangerous as to make some regulation necessary for the safety of other persons on the public ways.[5] Notwithstanding these and similar judicial utterances, it is particularly noticeable that up to the present time no court had stated or decided that the automobile itself is a dangerous vehicle either to the occupants or to the public. Whatever language the courts have used, which apparently condemns motoring, has been directed against the careless chauffeur or operator and not against the motor car. The foregoing statements may be subject to slight modification for the reason that it is stated in an *Ohio* case that the automobile is more dangerous than the street car, because the latter,

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4. Supreme Court of Illinois.—Christie v. Elliott, 216 Ill. 31, 1 L. R. A. (N S.) 124, 74 N. E. Rep. 1035.

5. Supreme Judicial Court of Massachusetts.—Com. v. Boyd, 188 Mass. 79, 74 N. E. Rep. 255; Com. v. Kingsbury, 85 N. E. Rep. 848. In Commonwealth v. Kingsbury, 85 N E. Rep. 848, the Supreme Judicial Court of *Massachusetts* in holding that the regulation of the use of automobiles on particular roads, even to their complete exclusion therefrom, is within the police power, with a view to the safety of the public, says:

"Automobile are vehicles of great speed and power whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travelers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways are reasonable and proper for the promotion of the safety of the public. It is the duty of the legislature, in the exercise of the police power, to consider the risks that arise from the use of inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in the different States with the approval of the courts."

being confined to tracks, can more easily be avoided in case of a threatened injury. In this case the operator of an automobile was arrested, tried, and fined $25 and costs by the police court of the city of Columbus, Ohio, for running his automobile at an unlawful speed within the city limits, in violation of an ordinance of the city of Columbus, which prohibited a speed in excess of seven miles an hour. The motorist contended that the law was partial and discriminated against automobiles, because another ordinance allowed street cars to run at a greater rate. The court held, however, that such a discrimination was proper, because street cars are confined to their tracks and can easily be avoided, whereas automobiles have no certain course, and on that account are much more dangerous to the pedestrian.[6]

§ 3. Motive power as affecting status.

There is no vehicle operated in the public streets and highways that bears much similarity to the automobile. The bicycle, it is true, occupies a unique position when compared with the older vehicles, but the motor carriage occupies a position and status of its own. The motor car's freedom of navigation, speed, control, power, purposes, and the existence or nonexistence of noise in running necessarily stamps the automobile with a status different from that attached to other vehicles. Especially is this true in reference to the motive power and its application. In animal-drawn vehicles the power is from the front. The vehicle is *drawn*. In automobiles the power is generally applied from the back of the carriage, and the vehicle is in fact *pushed* along. This radical difference in the appli-

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6. **Automobile more dangerous than street car.**—Chittenden v. Columbus, 26 Ohio Cir. Ct. 531.

cation of power is of importance, and may be controlling in legal controversies in respect to the condition of highways and other matters. Recent legislation has given the automobile a status of its own, if nothing else has.

§ 4. Advantages over animal-drawn vehicles.

The advantages of the automobile over animal-drawn vehicles are too numerous to mention in a work of this nature. However, there are one or two advantageous points in the motor vehicle's favor which should be mentioned. We have seen that there is an alleged element of danger in the operation of the horseless carriage. Aside from this, however, every other characteristic of the automobile is decidedly in its favor. It leaves no filth in the streets. It is the most sanitary vehicle that travels on the public ways. There certainly can never be any police regulation of the motor car's operation on account of filth, excepting the regulation of the emission of smoke. Automobiles occupy less space on the streets and highways than horse-drawn vehicles. The superiority of the automobile in these matters needs no further discussion to be convincing.

§ 5. Tendency to frighten horses.

That the automobile has a tendency to frighten horses unaccustomed to its appearance must be conceded. This has been one of the worst obstacles to motoring and driving, and has been the cause of much litigation. However, horses are fast being educated to the sight of the automobile, and when horses generally are no longer frightened at its appearance the legislative regulation concerning the meeting of horses and automobiles on the road will be no longer needed and without reason. As said by the Supreme Court of *California:* "Of course, if the use of automobiles gradually becomes more common, there may come a

time when an ordinance like the one here in question [the ordinance prohibited motoring at night on country roads] would be unreasonable. As country horses are frequently driven into cities and towns, many of them will gradually become accustomed to the sight of automobiles, and the danger of their use on country roads will be less." [7]

In connection with this subject it is of interest to note what has been said by the Appellate Division of the Supreme Court of *New York:* "Since the automobile has come into use upon our streets and highways these accidents [resulting from frightening horses] have been common, and actions to recover damages resulting therefrom have been frequent. These machines may be used on the public highways, but horses will also continue to be used for a time at least. Both may be equally used as motive power in public travel. Some horses are frightened when they meet these machines, and it is the duty of persons running the machines to exercise reasonable care to avoid accident when horses become frightened. It is not pleasant to be obliged to slow down these rapid-running machines to accommodate persons driving or riding slow country horses that do not readily become accustomed to the innovation. It is more agreeable to send the machine along, and let the horse get on as best he may, but it is well to understand, if this course is adopted and accident and injury result, that the automobile owner may be called upon to respond in damages for such injuries." [8]

§ 6. Judicial notice of characteristics.

The court will take judicial notice that automobiles may

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7. Frightening horses.—*Ex parte* Berry, (Cal. 1905) 82 Pac. Rep. 44.

8. Responsibility for frightening horses.—Murphy v. Wait, 102 N. Y. App. Div. 121, 92 N. Y. Supp. 253.

be driven at a high rate of speed.[9] Under a statutory provision requiring courts to take judicial notice "of the significance of all English words and phrases," a court will assume judicial knowledge of an automobile, its characteristics, and the consequences of its use. As said by the Supreme Court of *California:* "We may assume * * * to have what is common and correct knowledge about an automobile. Its use as a vehicle for traveling is comparatively recent. It makes an unusual noise. It can be, and usually is, made to go on common roads at great velocity—at a speed many times greater than that of ordinary vehicles hauled by animals; and beyond doubt, it is highly dangerous when used on country roads, putting to great hazard the safety and lives of the mass of the people who travel on such roads in vehicles drawn by horses." [10] The correctness of the foregoing statement is not intended to be vouched for. The quotation is given merely on the question of judicial notice.

§ 7. Classification of automobiles.

Automobiles have been divided into three classes: Heavy omnibuses or cars for road use in carrying passengers or goods; pleasure carriages for use in driving on the streets or roads in place of the ordinary horse and carriage; bicycles, tricycles, or quadricycles furnished with a motor to relieve the rider of the work of operating the pedals and to increase speed.[11]

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9. Judicial notice.—People v. Schneider, 12 Det. L. N. 32, 69 L. R. A. 345, (Mich. 1905) 103 N. W. Rep. 172, wherein the court says, "We may take judicial notice that many of these automobiles may be driven at a speed of at least forty miles an hour. Driven by indifferent, careless, or incompetent operators, these vehicles may be a menace to the safety of the public."

10. What the courts know about automobiles.—*Ex parte* Berry, (Cal. 1905) 82 Pac. Rep. 44.

11. Classification of automobiles.—Encyc. Brit. vol. 25, p. 303.

§ 8. Automobiles as carriers.

An automobile may be used as a common carrier, a private carrier, or a personal private conveyance. Public motor vehicles, such as sight-seeing cars, taxicabs, and others which are employed in carrying all persons applying for transportation, come within the definition that a common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage.[12] But to constitute one a common carrier it is necessary that he should hold himself out as one. A carrier of passengers who undertakes to carry all persons who apply to him for transportation is engaged in a public employment, and is a public or common carrier of passengers. "A common carrier of passengers," says Judge Thompson, "is one who undertakes for hire to carry all persons indefinitely who may apply for passage."

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12. Common carriers.—Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. Rep. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827. See the chapter concerning taxicabs and public automobiles.

CHAPTER IV.

RIGHT OF AUTOMOBILES TO USE HIGHWAYS AND STREETS.

§ 1. Highways defined.

Ways are either public or private. A way open to all people is a public highway. It will be noted that all the automobile regulations apply only when an automobile is operated on *public* avenues of travel. To drive a motor vehicle on a private way, it is not necessary to register the machine, nor need any specific statutory speed limit be complied with. The term highway is the generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. Every public thoroughfare is a highway.[1]

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1. **Highways.**—Elliott on Roads and Streets, (2d. ed.) pp. 1, 2. **Distinction between "highway" and "road."**—Johnson v. State, 58 S. W. Rep. 265.

Destruction of sign posts.—Wilfully defacing, injuring or destroying any mile post index board, sign post, bridge or causeway

§ 2. **Roads defined.**

A road is a passage ground appropriated to public travel. The word "road" cannot, however, be said to be one of uniform meaning; it has been variously defined, and is often enlarged or restricted by the language with which it is associated. The meaning of the word in statutes is ascertainable from the context and purpose of the particular legislative enactment in which it is found.[2]

§ 3. **Streets defined.**

A street is a road or public way in a city, town, or village. A way over land set apart for public travel in a town or city is a street, no matter by what name it may be called; it is the purpose for which it is laid out and the use made of it that determines its character. As the way is common and free to all people, it is a highway, and it is proper to affirm that all streets are highways, although not all highways are streets. Streets resemble, in many particulars, ordinary public roads, but there are, nevertheless, very important differences between the two classes of public ways. The purpose for which they are established is primarily the same, that of public travel, but many uses may properly be

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constitutes a misdemeanor, even though the sign or post, as the case may be, was erected by private individuals. Pullman v. State, 88 Ala. 190; 7 S. Rep. 148.

2. **Roads.**—Elliott on Roads and Streets, (2d ed.) pp. 6, 7.

Roadway is defined in the ordinances for the city of New York as "that portion of any street which is included between the curbs or curb-lines thereof and is designed for the use of vehicles."

Pent roads.—The term "highway," in the Vermont Rev. St. Sections 3178, 3179, relieving owners of land from the duty of maintaining fences on the sides of the highways, does not include pent roads. Carpenter v. Cook, 30 At. Rep. 998, 999, 67 Vt. 102; French v. Holt, 53 Vt. 364; Wolcott v. Whitcomb, 40 Vt. 40, 41; Bridgman v. Town of Hardwick, 31 At. Rep. 33, 34, 67 Vt. 132. *Contra* see Town of Whitingham v. Bowen, 22 Vt. 317.

made of streets which cannot rightfully be made or ordinary suburban roads. The rights of the public are much greater in streets than in the roads of the rural districts, and the methods of regulating their use, improvement, and repair are materially different. Where a statute uses the term street, and does so with reference to a town or city, and there are no limiting or explanatory words, it must be taken to mean a street in the true sense of the term. It is sometimes necessary to discriminate between the genus highways and the species streets, but when the species is designated there seldom can be any difficulty in determining what class of public ways is intended, although it will not do to conclude, in all cases where the term highways is employed, that streets are included.[3]

In some of the automobile acts passed by the States of the United States the terms public highways, ways, streets, and other terms pertaining to highways have been defined, as will be seen from an examination of the statutes.

§ 4. General purposes of highways and streets.

Primarily the general purpose of streets and highways is that of travel either on foot by a pedestrian or in a vehicle propelled by animal or other power. The members of the public have a right to use the public avenues for the purpose of travel and the transportation of property. It is improper to say that the driver of horses has rights in the

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3. Streets.—Elliott on Roads and Streets, (2d ed.) pp. 15, 16, 18, 19.

A street is defined in the ordinances for the city of New York as follows: "Every avenue, boulevard, highway, roadway, cartway, lane, alley, strip, path, square and place used by or laid out for the use of vehicles."

Curb is defined in the ordinances for the city of New York as "the lateral boundaries of that portion of a street designed for the use of vehicles, whether marked by curb-stones or not so marked."

road superior to the driver of an automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other.[4]

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4. Purposes of streets and highways.—Indiana Springs Co. v. Brown, (Ind. 1905) 74 N. E. Rep. 615.

Public highways are for the use of travelers and they are entitled to use the same unobstructed in any unusual manner. Ft. Wayne Cooperage Co. v. Page, 82 N. E. Rep. 83.

In Cater v. Northwestern Telephone Exchange Co., 63 N. W. Rep. 111, 60 Minn. 539, 28 L. R. A. 310, 51 Am. Rep. 543, Judge Mitchell says as follows:

"If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this (highway) easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and next a way for vehicles drawn by animals; constituting respectively the iter, the actus, and the via of the Romans. And thus the methods of using the public highways expanded with the growth of civilization until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the public easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed."

The easement of a highway embraces all travel not prohibited by law on foot, in carriages, omnibuses, stages, sleighs, or other vehicles, as the wants and habits of the public demand. The right of the public in the highway consists in the privilege of passage and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains and lay gas and water pipes. It can hardly be questioned that the primary and fundamental purpose of a public highway, street, or alley, is to accommodate the public travel, to afford citizens and strangers an opportunity to pass and repass on foot or in vehicles with such movable property as they may have occasion to transport, and every man has a right to use on the road a conveyance of his own at will, subject to such proper regulation as may be prescribed by authority. The easement

§ 5. **New means of transportation.**

That the purposes of the public ways contemplate new and improved means of transportation there can be no doubt. Travelers are not confined to horses and ordinary carriages. Animal or muscular power has no exclusive or superior rights on the public avenues of travel. The use to which the public thoroughfare may be put comprehends all modern means of carrying, including the electric street railroad and the automobile. Judge Cooly in 1876 said: "Persons making use of horses as the means of travel by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods. * * * When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods, and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even to the injury of those who continue to use the road after the same manner as formerly. A highway established for the general

for public travel is not to be limited to the particular modes of travel in use at the time the easement was acquired, but extends to and includes all such new and improved methods of travel, the utility and general convenience of which may be afterwards discovered or developed, as are in aid of the identical use for which the street was acquired. Carli v. Stillwater St. Ry. & Transfer Co., 10 N. W. Rep. 205, 28 Minn. 373, 41 Am. Rep. 290.

benefit of passage and traffic must admit of new methods wherever it is found that the general benefit requires them." [5]

The Supreme Court of *Illinois* has expressed itself as follows: "To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age." [6]

Again we find the same principle announced in 1905 by the Supreme Court of *Indiana,* which says: "In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for

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5. New means of transportation may be used.—Macomber v. Nicholas, 34 Mich. 217, 22 Am. Rep. 522.

"With respect to the methods of travel and transportation on the highway, as in all other spheres of action, the law seeks to adapt itself to the new conditions arising from the progress of invention and discovery. The ordinary highway is open to all suitable methods of use. Towle v. Morse (Me., 1908), 68 Atl. Rep. 1044.

The employment of an automobile on a highway as a means of transportation is a lawful use of the road; and if it results in injury to one traveling by another mode the driver of the machine cannot be held liable for the injury, unless it be made to appear that he used the machine at a time or in a manner or under circumstances inconsistent with a proper regard for the rights of others. McIntyre v. Orner, 166 Ind. 57.

"Automobiles are now recognized as legitimate means of conveyance on the public highway. The fact that horses unaccustomed to see them are likely to be frightened by their unusual sound and appearance has not been deemed sufficient reason for prohibiting their use, but it is an element in the question of due care on the part of the drivers of both horses and motor cars and a consideration to be entertained in determining whether such care has been exercised to avoid accident and injury in the exigencies of the particular situation." Towle v. Morse (Me., 1908), 68 Atl. Rep. 1044.

6. Cannot be banished from highways.—Moses v. Pittsburgh, etc., R. Co., 21 Ill. 515.

transportation purposes, conducted with due care, is made with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery provided the contrivance is compatible with the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of contrivance, that concerns the courts." [7]

§ 6. Equal rights of automobiles on public ways.

Clearly the motor vehicle is an improved method of locomotion, and if automobiles are operated in a way compatible with the general use of the public avenues of travel, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to those traveling by ordinary modes, the motor carriage has an equal right with other vehicles in common use, to occupy and use the public highways and streets, provided the statutory provisions have been complied with if any exist.[8]

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7. Law keeps up with progress.—Indiana Springs Co. v. Brown, (Ind. 1905) 74 N. E. Rep. 615.

8. Equal rights.—Upton v. Windham, 75 Conn. 288; Christie v. Elliott, 216 Ill. 31, L. R. A. (N. S.) vol. 1, p. 124, 74 N. E. Rep. 1035; Indiana Springs Co. v. Brown, (Ind. 1905) 74 N. E. Rep. 615; Shinkle v. Cullough, (Ky. 1903) 77 S. W. Rep. 196; Silberman v. Huyette, 22 Montg. Co. L. Rep. (Pa.) 39.

It is not negligence, as a matter of law, to use automobiles on the public highways. Indiana Springs Co. v. Brown, (Ind. 1905) 74 N. E. Rep. 615.

The owner of an automobile has the right to use the highways provided in using them he exercises reasonable care and caution for the safety of others and does not violate the law of the state. Christie v. Elliott, 216 Ill. 31, L. R. A. (N. S.) vol. 1, p. 124, 74 N. E. Rep. 1035.

Because automobiles are novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to seeing them, is no reason for prohibiting their use. Indiana Springs Co. v. Brown, (Ind. 1905) 74 N. E. Rep. 615.

Bicycles have equal rights on the public ways. Holland v.

The fact that an automobile is a comparatively new vehicle is beside the question. The use of the streets must be extended to meet the modern means of locomotion.[9]

Concerning the frequency of collisions between automobiles and pedestrians, it is of interest to study the opinion in Simeone v. Lindsay, 63 At. Rep., 779, by the Superior Court of *Delaware,* wherein Judge Pennewill says: "A public highway is open in all its length and breadth to the reasonable, common and equal use of the people on foot or in vehicles. The owner of an automobile has the same right as the owners of other vehicles to use the highways, and like them he must exercise reasonable care and caution for the safety of others. A traveler on foot has the same right to the use of the public highway as an automobile or any other vehicle. On using such highway all persons are bound to the exercise of reasonable care to prevent accidents. Such care must be in proportion to the danger in each case. Where one undertakes to pass another on the highway, going in the same direction, he must take reasonable care to exercise that right so as not to injure another, and would be liable for all consequences resulting from negligence on his part. It is the duty of a person operating an automobile * * * upon the public highway to use reasonable care in its operation, to move it at a rate of speed reasonable under the circumstances, and cause it to slow up or stop, if need be, when danger is imminent, and could by the exercise of reasonable care be seen or known in time

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Bartch, 120 Ind. 46, 22 N. E. Rep. 83, 16 Am. St. Rep. 317; Lacey v. Winn, (Com. Pl.) 3 Pa. Dist. Rep. 811; Lacey v. Winn, (Com. Pl.) 4 Pa. Dist. Rep. 409.

A bicycle being a vehicle, riding one in the usual manner on a public highway is not unlawful. Thompson v. Dodge, 58 Minn. 555, 60 N. W. Rep. 545, 28 L. R. A. 608.

9. That the automobile is a new vehicle is immaterial. Chicago v. Banker, 112 Ill. App. 64.

to avoid accident. There is a like duty of exercising reasonable care on the part of the person traveling on foot. The person having the management of the automobile and the traveler on foot are required to use such reasonable care, circumspection, prudence and discretion as the circumstances require, and increase of care being required where there is increase of danger. Both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances. The more dangerous the character of the vehicle or machine, and the greater its liability to do injury to others, the greater the degree of care and caution required in its use and operation." [10]

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10. Automobiles may use highways.—The use of automobiles on a highway is allowable, if ordinary care be exercised in their use. Fletcher v. Dixon, 68 Atl. Rep. 875.

"With respect to the methods of travel and transportation on the highway, as in all other spheres of action, the law seeks to adapt itself to the new conditions arising from the progress of invention and discovery. The ordinary highway is open to all suitable methods of use. Towle v. Morse, (Me. 1908), 68 Atl. Rep. 1044.

The driver of a horse and buggy and the operator of an automobile have equal rights in the use of the streets, and each must observe reasonable care for the other's safety, determined from the extent of danger incident to the use of the respective vehicles, and therefore merely running an automobile into a street while horses are driven thereon does not authorize an inference of negligence of the operator of the automobile. O'Donnell v. O'Neil, 109 S. W. Rep., 815.

"An owner of an automobile has as much right to the highway as the driver of a horse and carriage. If a horse cannot be driven past a vehicle or car properly managed, the driver should keep him off the highway or submit to the consequences." Per J. Weand, in Silberman v. Huyette, 22 Montg. Co. L. Rep. (Pa.) 39.

In *Iowa* the right to use an automobile on the highways of the state is expressly conferred by Acts 30th, Gen. Assem. c. 53 (Laws 1904, p. 44). House v. Cramer, 112 N. W. Rep. 3.

§ 7. Automobiles have no superior right of way.

Although automobiles may be said to possess an equal right to use the public highways and roads, after the registration and licensing requirements have been complied with, nevertheless they possess no superior right of way over other vehicles.[11]

§ 8. Rights on ferries and vessels.

While dealing with the right of automobiles to use the public highways, it is of interest to consider the motor vehicle's right on ferries, which are in the nature of highways, and are generally a continuation thereof. The Revised Statutes of the United States prohibiting passenger steamers to carry as freight certain articles, including petroleum products or other like explosive fluids, except in certain cases and under certain conditions, was amended by the Act of Feb. 21, 1901, ch. 386, 31 Stat. at L. 799. U. S. Comp. Stat. 1901, p. 3050, which provided that: "Nothing in the foregoing or following sections of the act shall prohibit the transportation by steam vessels of gasolene or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: *Provided, however,* That all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel and the same be not relighted until after said vehicle shall have left the same. * * * " Under this statutory provision it was held that gasolene contained in the tank of an automobile being transported on a steam vessel was carried as freight within the meaning of the statute, that an automobile in which the motive power was generated by passing an electric spark

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11. No superior right of way.—Lorenz v. Tisdale, 111 N. Y. Supp. 173.

through a compressed mixture of gasolene and air in the cylinder, causing intermittent explosions, carried a fire while the vehicle was under motion from its own motive power; and that the carrying by a steam ferryboat of such a vehicle, which was run in and off the boat under its own power, was a violation of the statute.[12]

In 1905 Congress amended the existing law by enacting that " nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasolene or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: *Provided, however,* That all fire, if any, in such vehicles or automobiles be extinguished immediately after entering the said vessel, and the same be not relighted until immediately before said vehicle shall leave the vessel: *Provided further,* That any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles, the tanks of which contain gasolene, naphtha, or other dangerous burning fluids." [13]

It will be seen that Congress has relieved, by this amendment, steam vessels from the penalty which they were subjected to under the old law as construed by the decision in The Texas, 134 Fed. Rep. 909; however, as the law now stands, " any owner, master, agent, or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles " carrying gasolene, naphtha, or other dangerous burning fluids.

§ 9. Exclusion of automobiles from highways.

Of the exclusion of automobiles from the public ways there is quite a little to be said. In nearly all the states

12. Rights on ferries.—The Texas, 134 Fed. Rep. 909.

13. Congressional legislation.—See 33 Stat. at L., part 2, p. 720.

which have passed automobile legislation, it is provided that motor vehicles shall not be operated on the public avenues of travel unless the statutory provisions have been complied with. This the legislatures undoubtedly have the authority to command.[14]

The Attorney-General's department of *Pennsylvania* on November 9, 1905, rendered an opinion in which it is stated that no motor vehicle, whether automobile or bicycle driven by a motor, may be lawfully driven, ridden, or operated upon the streets and highways of the state after the first day of January, 1906, unless the operator thereof shall have first obtained from the state highway department a license for that purpose, and shall have further complied with all of the regulations and requirements imposed by the act.[15]

There is also very little doubt of the law-making body's power to set apart certain places or roads, free from motor carriage travel, where a reasonably sound necessity exists for the exclusion of automobiles from such places. But there can be no unreasonable discrimination against the motor car in this respect. As said before, it has an equal right to use the highways. Where this right is unlawfully withheld, the authorities may be compelled to grant the right or forced to desist from interfering with it. Of course, the right of a particular party may be forfeited for a time if provided for by statute, and if the offending party shows that he is not as an operator or a driver fit to use the highways. In connection with the exclusion of auto-

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14. State may regulate operation of automobiles.—See people v. MacWilliams, 91 N. Y. App. Div. 176, 84 N. Y. Supp. 357.

15. Registration and license necessary.—*In re* Automobile Acts, 15 Pa. Rep. 83.

mobiles from the public highways, important and interesting cases have arisen in *California,*[16] and *Massachusetts.*[17]

The board of county supervisors of Marin county framed an ordinance which provided that " no person shall run an

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16. California decision.—*Ex parte* Berry, (Cal. 1905) 82 Pac. Rep. 44.

17. Massachusetts case.—In Com. v. Kingsbury, 85 N. E. 848, the Massachusetts Supreme Court holds that the regulation of the use of automobiles on particular roads, even to their complete exclusion therefrom, is within the police power. And a delegation of the power to make such regulations to boards of aldermen and selectmen is not improper.

The court in this case says:

" It seems too plain for discussion that, with a view to the safety of the public, the Legislature may pass laws regulating the speed of such machines (automobiles) when running upon the highways. The same principle is applicable to a determination by the Legislature that there are some streets and ways on which such machines should not be allowed at all. In some parts of the State where there is but little travel public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travelers with horses and with vehicles of other kinds if automobiles were allowed there.

" No one has a right to use the public streets and public places as he chooses, without regard to the safety of other persons who are rightly there.

" In choosing his vehicle, everyone must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way.

" In parks and cemeteries and private grounds, where narrow roads with precipitous banks are sometimes constructed for carriages drawn by horses, it has been a common practice to exclude automobiles altogether, chiefly because of the danger of their frightening horses.

" The right of the Legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets as public ways in a city or town, seems to us well established both upon principle and authority."

automobile on any * * * highways of Marin county between the hours of sunset of any day and of sunrise on the day following." A violation of the law was made punishable by a fine or imprisonment. A motorist was convicted of a violation of this regulation and was sent to jail. *Habeas corpus* proceedings were brought to regain the prisoner's liberty, claiming that the ordinance of the county commissioners prohibiting the operation of motor cars at night was unreasonable, and, therefore, his imprisonment was illegal. The Supreme Court of *California,* however, decided that the ordinance constituted a reasonable and valid regulation within the power of the commissioners to make. This regulation and decision prohibits the motorist from returning home in his car at night if he should happen to get temporarily stuck in the country road mud. It is interesting to note what the court said in this case. The justice writing the opinion states (using his exact language): "If the use of automobiles gradually becomes more common, there may come a time when an ordinance like the one in question would be unreasonable. As country horses are frequently driven into cities and towns, many of them will gradually become accustomed to the sight of automobiles, and the danger of their use on country roads will grow less." Prohibiting the use of country roads at night would seem to be exercising the right to regulate motoring to its limit, and possibly beyond lawful regulatory power, especially in view of the fact that horses have no superior right on the road. Such a regulation comes very near amounting to prohibition. The frightening of horses, beyond doubt, is an incident to the lawful use of the public highways, and does not of itself constitute a wrong *per se* upon which alone legal liability may be based. In a case decided in 1902 by the Supreme Court of Errors

of *Connecticut*,[18] it was held that the fright and shying of a gentle horse at the passing of an automobile, driven with ordinary care and at a reasonable speed, was an event incident to the proper use of the highway. The facts of this case were as follows: While meeting and passing an automobile a gentle horse, which was being driven with due care, became frightened, shied, veering sharply to the right, and being within a few feet of the right side of the road, plunged down a declivity of some three or four feet to the adjoining land, ran a distance of some fifty feet and then, taking another turn, overturned the carriage, injuring an occupant. The automobile was being driven at the time with ordinary care and at a reasonable speed. It was claimed that the automobile was the proximate cause of the injury and not the failure of the town authorities to protect the bank of the road. The town was held to be liable for the injuries caused by its failure to make the highway reasonably safe for travel. The defect in the highway was the lack of a sufficient railing or fence on the side of the road. In contrast to the severity of the *California* decision above mentioned, it is interesting to note an important case decided by the Appellate Court of *Illinois*.[19]

In this case it was held that as a prerequisite to one operating his automobile for pleasure on the public ways, the city of Chicago had no power to require a party who uses his automobile for his private business and pleasure only, to submit to an examination and to take out a license, for such is imposing a burden upon one class of citizens in the use of the streets which is not imposed upon others, and such an ordinance was beyond the power of the city

18. Connecticut case.—Upton v. Windham, 75 Conn. 288, *distinguishing and affirming* Britian v. Sharon, 71 Conn. 686.

19. Illinois decision.—Chicago v. Banker, 112 Ill. App. 94.

counsel, and was, therefore, void. A turnpike company had an undoubted right, in the exercise of a sound discretion, to prevent such use of its road as would make it dangerous to the general public. The managers of highways owned by private corporations have an undoubted right, in the exercise of a sound discretion, to prevent such use of the highway as will make it dangerous. Unless forbidden by legislative enactment, as is sometimes done in the case of bicycles, they may exclude from their highways a carriage or vehicle, the use of which is dangerous, where the safety of the general public demands such exclusion.[20]

§ 10. Tolls.

A judicial decision of much importance to automobilists, handed down by the Supreme Court of *New York*, held that a certain toll bridge company possessed no legal right to charge tolls for automobiles. The charter of this company enumerated specifically the classes of vehicles for the passage of which tolls could be collected; it made no mention of automobiles.

The importance of this decision is due to the fact that there are many other toll bridges throughout the United States which possess similar charters, and must therefore permit automobiles to pass over their bridges toll free. However, if the charter of such a corporation expressly authorizes the company to charge tolls for certain classes of vehicles mentioned, and in enumerating the list uses the phrase "any other vehicle," then the automobile might be held to pay toll.

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20. Exclusion from turnpike.—Berties v. The Laurel Run Turnpike Co., 15 Pa. Dist. Rep. 94.

Automobile may use turnpike upon paying reasonable toll.—Scranton v. Laurel Run Turnpike Co., 14 Luz. Leg. Rep. (Pa.) 97.

The principle of law governing the subject of exacting automobile tolls is that a corporation which is given valuable privileges from the State possesses only those powers which are expressly granted or conferred by necessary implication from the charter provisions. Justice Spencer, of the *New York* Supreme Court, in making the decision here referred to, says:

"The company's right to exact tolls is confined to the animals and vehicles specified in the act conferring the franchise. All other animals and vehicles must be presumed to have the right to cross free. The fact that automobiles were not known at the time of the passage of the act makes no difference, for the reason that defendants, by accepting the franchise in consideration for the right to collect the tolls stipulated for, assumed the duty and responsibility of building and maintaining a bridge that would meet the reasonable requirements of all travelers on the public highway, including vehicles and animals then in common use by travelers, and also such as might thereafter come into common use. Its power to collect toll is derived from the provisions of the franchise. It stipulated for no other or further right, and may not exact toll except as therein provided. If it deems it necessary to require payment of tolls from others it must apply to the Legislature for authority so to do. Its power must be strictly construed."

The amount of tolls exacted from automobilists by toll bridges and toll roads figures up to thousands of dollars. As a general rule the charge for the passage of a motor vehicle is much higher than the charge for other carriages. There is no reason for this increased price for the passage of automobiles, except the fact that ordinarily the motorist can afford to pay it.[21]

21. Toll bridges.—Mallory v. Saratoga Lake Bridge Co., 104 N. Y. Supp. 1025, 53 Misc. Rep. 446.

As to the exclusion of non-resident motorists from the public ways, there is no authority or power in the State to do this, on the ground of nonresidence, and the States have no power to place greater restrictions or burdens on non-resident automobilists than those imposed on their own citizens. Such action on the part of a State would violate the Federal Constitution. However, the State may compel nonresidents to comply with the regulations controlling residents. No discrimination is created in such a case, as all are treated alike.

§ 11. Compelling privilege of using road—Pleading.

A petition for a writ of mandamus commanding a turnpike company to allow the petitioner, while operating and using his automobile, the right and privilege of passing over and upon its turnpike road, upon his paying the tolls established by law for the passage of vehicles of similar weight and width of tires over turnpike roads of the commonwealth of *Pennsylvania*, must aver that the petitioner has complied with all the requirements of the provisions of the State Automobile Act.[22]

New York statute.—Since the above decision the Legislature of *New York* passed an enabling act allowing toll bridges to charge reasonable tolls for automobiles, but no more than is charged for other vehicles. See L. 1907, Ch. 127.

Assault on toll gate keeper.—Evidence, although contradicted, that the defendants approached a toll gate in an automobile, and when toll was demanded choked the keeper, rushed their machine through the gate and injured the keeper's wife, and that they had previously driven through a number of toll gates at a high rate of speed without paying toll, is sufficient to warrant a verdict of guilty of assault. In such a case a demand by the keeper for a higher rate of toll than was legal did not justify the assault.—Com. v. Rider, 29 Pa. Super. Ct., 621.

22. **Mandamus.**—Bertles v. The Laurel Run Turnpike Co., 15 Pa. Dist. Rep. 94.

CHAPTER V.

REGISTRATION AND LICENSING.

§ 1. General considerations.

In many of the States there have been passed statutes requiring the registration of automobiles or owners, manufacturers and chauffeurs. In some jurisdictions only the machine is required to be registered, in others the operator and in others the owner. Some of the States, like New York, in the law of 1904, require registration by owners, manufacturers, and chauffeurs.

The statutes providing for registration generally enact that the party to register must file a statement containing his name, address, and a description of the machine, which statement is to be filed with the secretary of state or some other officer, who, upon receipt of the statement and a prescribed fee, makes a record of the application, whereupon the officer issues to the applicant a number which cor-

responds with the number against his name as recorded. The precise statutory provisions of the various states are ascertainable by writing to the secretary of state or other officer having charge of registrations. Blanks will be furnished upon request. The number assigned is generally required to be displayed on the machine in a conspicuous place.[1]

Usually number tags or plates are carried on both the rear and front of the automobile, however, in a number of jurisdictions the displayment of the number is only necessary on the back of the motor vehicle. Some of the States require the number plate to be fixed and to be placed a certain distance from the ground. It is also a common requirement that the number must be kept free from obliteration. In certain states where registrations are annual, the number plates are furnished by the State and each year a different colored number plate is used as has been the custom and practice in *Pennsylvania*. This affords an easy method of detecting those who have failed to register, however, reasonable opportunity to obtain new plates should be given from year to year.

§ 2. **Registration systems.**

Every State in the United States and every foreign country which has sought to regulate the operation of automobiles on the public thoroughfares has compelled by law registration with a certain official, and in many of the States and foreign jurisdictions chauffeurs especially are

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1. **Indictment.**—Where a statute provides that every person "desiring" to operate an automobile must obtain a license from certain officers, an indictment is not bad because of the omission of the word "desire," the indictment otherwise substantially following the language of the statute. State v. Cobb, (Mo. App. 1905) 87 S. W. Rep. 551.

required to register. Although each State and foreign country has established a registration system, there is, however, considerable difference in the systems adopted. Why there should be this difference cannot perhaps be explained. The general conditions in all the jurisdictions, both State and foreign, are much the same. The same kinds of automobiles are also used.

There are in existence two general systems of registration, viz.: First, registration of automobiles by owners; second, registration of all drivers. It certainly seems somewhat inconsistent for the State of *New York,* for example, to require the machines themselves to be registered, and upon crossing over the border into *Pennsylvania* we find the law totally ignoring the vehicle, but specifically requiring drivers or operators to register. In that State the Highway Department issues the licenses and number plates to drivers. The driver must hang his personal number on the front and back of whatever car he happens to be driving, no matter whether he is an owner, chauffeur, lessee or borrower of the machine. It will be seen that in *New York* a record is kept of machines, while in *Pennsylvania* the names of the drivers are recorded. The *English* act is similar to the *New York* law in this respect, but drivers must also register and be licensed. The purpose of the automobile registration systems is to afford a means of identifying the automobilist if for any lawful reason his identity is desired to be ascertained. The theory is that from the number the name of an offending automobilist may be ascertained from the officer keeping the record.

Is a system requiring the registration of automobiles by owners more conducive to correct identification than a system requiring the registration of all drivers?

This is an important question. It may be that neither system is of much practical use considering the promiscuous way number plates are loaned and exchanged, but considering the question in connection with accurate identification, assuming that there is no misuse of numbers, it certainly must be conceded that the system which registers all drivers, more directly tends to afford a quick means of identifying the person wanted. To register the machine by the owner does no more than identify the automobile. Of course, the name of the owner may be ascertained, but it would not be as easy to discover the name of a person other than the owner who may be the real party wanted; at least, this method of identification is more indirect and subject to failure. It is a recognized fact that the registration systems which place automobiles only on record have proven to be of little use in finding the real culprit who speeds away leaving nothing behind but his victim and seldom a record of his car.

§ 3. Registration by corporations and partnerships.

Under the *New Hampshire* automobile law which requires all automobiles and motor cycles to be registered by the owner or person in control, and prohibiting any person to operate such a vehicle until he shall first have obtained a license, which he must keep with him when operating the machine, a corporation or partnership owning a vehicle covered by the statute, according to a recent decision of the Supreme Court of *New Hampshire*, must register the automobile in the corporate or firm name, but the license is not to be issued to the corporation or firm as such, it being personal to the operator.[2]

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2. Corporations and partnerships.—Emerson Troy Granite Co. v. Pearson, 64 Atl. Rep. 582.

§ 4. Traction engines.

The law of the State of *New Hampshire* which requires the licensing of operators of automobiles, and defining automobiles as all vehicles propelled by other than muscular power, except railroads and railway cars, and motor vehicles running only upon rails or tracks, and road rollers, has been held by the Supreme Court of *New Hampshire* to include a road locomotive or traction engine used to draw cars.[3]

§ 5. Status of unlicensed automobilist.

Though, under the *Massachusetts* law declaring that no person, except as therein provided, shall operate an automobile upon a public highway unless licensed so to do, and unless the automobile is registered under the act, a person without a license so operating an unregistered automobile would not be a traveler, except as a violator of the law, and could not recover from the town for a defect in the road, yet proof that a person is so licensed and that his automobile is registered is not a condition precedent to his recovery for damages caused by a defect in a road, but is matter of defense, since presumptions both of law and fact are in favor of innocence, and where one would avoid liability on the ground of a violation of law by the plaintiff, he must prove the violation.[4]

§ 6. Age limit.

The relation of the age of automobile drivers to the safety of the public has been a subject for legislative action in some of the States. The proper age limit for automobile drivers is a question which admits of much argument. Obviously there should be some limit,

3. Traction engines.—Emerson Troy Granite Co. v. Pearson, 64 Atl. Rep. 582.

4. Unlicensed automobilist. —Doherty v. Town of Ayer, 83 N. E. Rep. 677.

but whether it can be fixed arbitrarily, irrespective of the intelligence of the person, is a serious problem. In law, a person under the age of twenty-one is deemed incapable of performing many acts which are mainly of a contractual nature. Those who are under that age are termed "infants" and are not entitled to act *sui juris* until the twenty-first year has arrived. Infants have always been treated as "incompetent" and classed with persons *non compos mentis;* in the early history of our jurisprudence they were placed in the same category with married women, who practically had no distinct rights. But it will be found that the persons who were deemed *non sui juris* were considered more particularly incompetent to enter into relations of a contractual nature. The law says that an infant's contract shall not be binding upon him, but will hold the other party. This is for the infant's protection only. He, and he alone, can repudiate his obligation. The other party cannot. This doctrine has a bearing upon the right to declare a person under a certain age incompetent to run a power vehicle on the public thoroughfares. We must not labor under the delusion that an infant is not liable for civil wrongs such as torts, for he is so liable. He is also liable criminally for violating the criminal laws, but under the age of seven the common law presumes him incapable of crime. From seven years to fourteen he is presumed incapable of crime, but the presumption is only *prima facie,* and may be rebutted. From fourteen years and over he is liable criminally just the same as any adult.

The status of the infant has been thus defined in order that it might be understood in considering his just rights in respect to using the public highways.

Manifestly a boy from five to twelve years old and even older should not be allowed to drive an automobile in the streets. But where should the line be drawn? Does the

safety of the public demand that all automobile drivers should be at least twenty years old, regardless of exceptional intelligence? We want to protect the users of our highways from danger, but at the same time proper persons should not be excluded from using the avenues of travel. The age limit of twenty years seems too high and fixes an unjust arbitrary standard. It absolutely debars all persons under that age from using automobiles as their own drivers. And it may be asked, does the age limit of twenty years have any logical relation to the protection of the public, any more so than the age limit of eighteen years, as now provided in *New Jersey?* A better way or method would be to provide that all persons under a certain age, say sixteen years, are prohibited absolutely to drive automobiles, and all over sixteen years of age and under eighteen for example, are presumed incompetent until satisfactory proof has been presented to the licensing authorities. After all, it is a question of intelligence and discretion and not one of age.

Tags permitted in Pennsylvania.—All tags bearing licensed numbers, with the exception of the two furnished by the State highway department under the *Pennsylvania* Act of April 19, 1905, P. L. 217, must be removed from automobiles while being operated within the limits of the commonwealth.[5] The *Pennsylvania* Act of April 19, 1905, P. L. 217, regulating the licensing, operating, etc., of motor vehicles, providing *inter alia* that not more than one state license number shall be carried upon the front or back of the vehicle, and that a "license number obtained in any other place or state shall be removed from said vehicle while the vehicle is being used within this commonwealth,"

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5. Tags in Pennsylvania. —*In re* Automobile Acts, 15 Pa. Dist. Rep. 83.

was held not to conflict with nor supersede the ordinance of December 26, 1902, of the city of Philadelphia, which also provides for the licensing, regulation, and operation of motor vehicles within that municipality. Both the act and the ordinance were held to stand together, and, for motor vehicles operated within the said city, both state and city licenses must be obtained and both license tags displayed, a municipality not being within the meaning of the word " place " as used in the act. It was also held that the speed regulations of the said ordinance must also be obeyed.[6]

§ 7. **Purpose of registration.**

The reason assigned for the necessity of registration and licensing is that the vehicle should be readily identified in order to debar operators from violating the law and the rights of others, and to enforce the laws regulating the speed, and to hold the operator responsible in cases of accident. The legislatures have deemed that the best method of identification, both as to the vehicle and the owner or operator, is by a number on a tag conspicuously attached to the vehicle. In case of any violation of law this furnishes means of identification, for, from the number, the name of the owner may be readily ascertained and through him the operator.[7]

It is not difficult to see that the registration and numbering of automobiles is intimately connected with their safe operation in the state. Many automobiles are precisely alike in external appearance. They are sometimes operated by those whose faces are partially concealed and whose

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6. **State and municipal regulations.**—Brazier v. Philadelphia, 15 Pa. Dist. Rep. 14.

7. **Purpose of registration.**—See People v. MacWilliams, 91 N. Y. App. Div. 176, 86 N. Y. Supp. 357; People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172, 12 Det. L. N. 32, 69 L. R. A. 345.

identity is uncertain. Those operators who are most reckless and indifferent—and those are the ones that endanger the safety of others—may violate the law with impunity unless some method is adopted by which they or their automobiles may be identified. A provision in a law for registration and numbering is such a method. It is reasonable to believe that, when he knows that the number displayed on the automobile identifies the vehicle, fear of discovery and punishment will lead the automobile driver to observe the requirements of the law.[8]

§ 8. Power to require registration and license.

As has been shown requiring automobiles or the operators to be registered is a mere statutory requirement and an effective precaution against reckless motoring. Since the statutory measures are directed against careless driving it would seem that only the operator, whether he is the owner or a chauffeur, should be compelled to register, as is now the case in many of the states. Undoubtedly the state or a duly authorized municipality has the power to enact laws on this matter requiring registration and the payment of a fee.[9]

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8. Identification.—See People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172, 12 Det. L. N. 32, 69 L. R. A. 345.

9. Power to require registration.—Com. v. Boyd, 188 Mass. 79, 74 N. E. Rep. 255; People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172, 12 Det. L. N. 32, 69 L. R. A. 345; Com. v. Hawkins, 14 Pa. Dist. Rep. 592. See also People v. MacWilliams, 91 N. Y. App. Div. 176, 86 N. Y. Supp. 357. But see Chicago v. Banker, 112 Ill. App. 94.

The provision of the Pennsylvania Act of 1903, requiring the registration of automobiles is a valid exercise of the police powers. Com. v. Densmore, 29 Pa. Co. Ct. 217.

In Com. v. Hawkins, 14 Pa. Dist. Rep. 592, the court upheld the validity of an ordinance (passed by the city of Pittsburg under the power conferred by the special Act of April 1, 1868 [P. L. 565, sec.

However, there is one case decided in this country which goes very far in denying the right of a municipality to require the registration of automobiles and the payment of a license fee. That case is Chicago v. Banker, 112 Ill. App. 94, wherein it was held that an ordinance of the City of Chicago which required one who uses his automobile for his private business and pleasure only to submit to an examination and to be licensed as an "automobile operator" (if the examining board see fit to grant him a license) imposes a burden upon one class of citizens in the use of the streets not imposed upon others, and is, therefore, void. In this case, the court declared that, conceding that what is fairly implied is as much granted as what is expressed, nevertheless the charter of a municipal corporation is the

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71,] to regulate and license every description of carriages) which makes it unlawful for any person to operate, or cause to be operated, upon the streets of the city, an automobile, motor vehicle, or other conveyance or wagon, the motive power of which shall be electricity, steam, gasolene, or any source of energy other than human and animal power, except upon the conditions, *inter alia*, of the payment by the owner of an annual license fee of six dollars if the vehicle is intended to carry one or two persons, and a fee of ten dollars if intended to carry more than two persons. The court said that the license imposed was not unreasonable, and was uniform upon different kinds of the several classes of vehicles named; and that that was all the law required in that respect.

The power conferred upon the city of Pittsburg, Pennsylvania, by the special Act of April 1, 1868 [P. L. 565], to impose a license upon automobiles used in the city streets, was not repealed by the Act of April 23, 1903 [P. L. 268], regulating the use of automobiles throughout the state as the later act contains no repealing clause, and by the provision of the 7th section, to the effect that the amount of license prescribed by the act shall not apply to any city or other municipality in which the authorities have imposed a license fee for the same purpose, indicates an intention to preserve to the municipalities any authority previously conferred upon them authorizing the licensing of vehicles. Com. v. Hawkins, 14 Pa. Dist. Rep. 592.

measure of its powers, and the enumeration of those powers implies the exclusion of all others. Among other powers enumerated in the charter of the city is that of regulating the use of the streets and the speed of vehicles within the limits of the corporation, and also the power to license and regulate certain occupations. The opinion is this case purports to put the decision upon the usual ground that the ordinance wrongfully discriminates between different classes of citizens. The actual decision, however, was upon the ground that the charter did not confer requisite power upon the city council to enact the ordinance.[10]

Such legislation is an exercise of the police powers of the state or municipality. In Com. v. Boyd, 188 Mass. 79, 74 N. E. Rep. 255, the Supreme Judicial Court of *Massachusetts* held that the *Massachusetts* statute was not unconstitutional which required automobiles to be registered, and the displayment on the automobile of the registered number in Arabic numerals not less than four inches long, and which also exacted a registration fee of two dollars for each vehicle. In this case the court declared that there could be no question as to the right of the legislature, in the exercise of the police power, to regulate the driving of automobiles on the public avenues of travel; that they are capable of being driven, and are apt to be driven, at a high rate of speed, and when not properly driven are so dangerous as to make some regulation necessary for the safety of other persons on the public highways. It was also declared that the registration fee was clearly a license fee, and not a tax; and that, since the act was passed by the legislature, it was unnecessary to consider whether a like act could be passed by a city. The court distinguished the case of Chicago v. Banker, 112 Ill. App.

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10. See L. R. A. (N. S.) vol. I., p. 127.

94, on the ground that the ordinance of the city of Chicago involved in that case was passed by a municipality and not by the legislature. Where the charter of a city authorized the common council to control, prescribe, and regulate the use of its streets, etc., it was held that there was conferred upon the city council authority to pass an ordinance requiring the regulation and numbering of automobiles using the streets of the city, and imposing a fee of one dollar therefore to cover the cost of aluminum figures to compose the number, furnished by the city.[11]

Where it was contended that a provision of a city ordinance for registering and numbering amounted to a license, and that a grant of authority to regulate gave the city no power to license, the court declared that the provision, if a license at all, was a license as a mere means of regulation; and, if the speed of automobiles cannot be effectually regulated without licensing them, the grant of the power to regulate confers upon the city the power to license, unless the exercise of that power is forbidden by some other provision of the law.[12]

An act of *Pennsylvania* which empowered the city of Pittsburg "to regulate and license all cars, wagons, drays, coaches, omnibuses, and every description of carriages" was held to authorize the city to impose a license on auto-

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11. Local or municipal requirements.—People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172, 12 Det. L. N. 32, 69 L. R. A. 345. In this case the court in commenting on the case of Chicago v. Banker, 112 Ill. App. 94, stated that the city ordinance in that case went further than the one in the case at bar.

New York decisions.—Buffalo v. Lewis, 123 N. Y. App. Div. 163, 108 N. Y. S. 450, *affirmed* by Court of Appeals, N. Y. Law Journal, June 1, 1908; People v. Keeper of Prison, 121 N. Y. App. Div. 645, 106 N. Y. S. 314, *affirmed* 190 N. Y. 315.

12. Powers municipality.—People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172, 12 Det. L. N. 32, 69 L. R. A. 345.

mobiles, notwithstanding they were unknown when the act was passed.[13]

As bearing on the question whether legislation enacted before the automobile was known or in use includes the modern means of transportation, it should be mentioned here that a statute imposing a tax on the transportation of "hacks, cabs, omnibuses, and other vehicles for the transportation of passengers for hire" was held not to include an electric automobile where such was not known or in use at the time the act was passed.[14]

§ 9. Constitutional law.

In almost all of the cases where automobile legislation has been contested it has been urged that the legislation requiring the registration and licensing, or prescribing other duties of automobilists, was unconstitutional as imposing burdens upon the automobile driver which were not imposed against others, consequently there was an unauthorized and unconstitutional discrimination or class legislation, but the contention has been decided to be unsound, and the legislation, generally, has been upheld.[15]

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13. Authority of municipality under general licensing law.—Com. v. Hawkins, 14 Pa. Dist. Rep. 592. *Compare* Washington Elec. Vehicle Transp. Co. v. District of Columbia, 19 App. Cas. (D. C.) 462.

14. Applicability of old law.—Washiington Elec. Vehicle Transp. Co. v. District of Columbia 19 App. Cas. (D. C.) 462.

15. Legislation constitutional.—Christie v. Elliott, 215 Ill. 31, 74 N. E. Rep. 1035, vol. 1 L. R. A. (N. S.) 124; Com. v. Boyd, 188 Mass. 79, 74 N. E. Rep. 255; People v. Schneider, (Mich. 1905) 103 N. W. Rep. 173, 12 Det. L. N. 32, 69 L. R. A. 345; People v. MacWilliams, 91 N. Y. App. Div. 176, 86 N. Y. Supp. 357; Com. v. Densomer, 13 Pa. Dist. Rep. 639; Unwin v. State, 64 Atl. Rep. 113, *affirmed*, State v. Unwin, 68 Atl. Rep. 110.

Pointing out constitutional provision violated.—Where it was attempted to question the consitutionality of the Missouri Automobile Act of 1903, which required a license on the part of persons

Class legislation.—Among the many complaints by automobilists against automobile laws, it is frequently alleged

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desiring to operate an automobile, the court declined to consider the question, because neither the article, nor the section of the Constitution claimed to have been violated, was pointed out or referred to in the defendant's motions or briefs. State v. Cobb, (Mo. App.) 87 S. W. Rep. 551.

The Missouri law of 1903, p. 162, relating to the operation and speed of automobiles on the highways of the State, fixing the amount of license, and prescribing a penalty for violating the same, is not unconstitutional as class legislation, in that it discriminates against certain users of the highway.—State v. Swagerty, 102 S. W. Rep., 483, 203 Mo. 517, 10 L. R. A. (N. S.), 601.

In New York the Motor Vehicle Law (chap. 538, Laws of 1904) was designed as a new, complete and general enactment to take the place of all previous statutes and ordinances relating to the use of streets and highways by motor vehicles. A city has, therefore, no authority by virtue of its charter provisions previously enacted to impose a charge upon such vehicles using its streets. Nor can such a charge be upheld by designating it in the ordinance as a tax, as in this case, and providing that its proceeds shall go to the street repair fund.

Automobiles have but recently come into common use. Within the last few years their use has not only greatly increased, but tours therewith have been extended to long distances and through many municipalities. Good judgment has not always accompanied their use, and the rights of others have sometimes been overlooked by their owners or drivers, and more or less opposition to the streets and highways being occupied by automobiles has arisen. The opposition to such use has frequently found expression in local restrictive rules and ordinances. Such local rules and ordinances existing prior to the enactment of the Motor Vehicle Law were not only dissimilar and conflicting, but sometimes difficult to understand. The necessity for a uniform law throughout the States was apparent. The Motor Vehicle Law was clearly designed as a new, complete and general enactment to take the place of all previous statutes, ordinances or rules relating to the use of streets and highways by motor vehicles. The purpose of the Legislature in enacting such law is shown in the clear and unmistakable language used by it. In the first section of the act it asserts that, except as therein otherwise provided, it shall be controlling in the use of the public highways. With the exceptions stated in the act, it provides that local authorities shall have

that such laws constitute class legislation and are for that reason illegal. It is therefore pertinent to ask what con-

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no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license or permit to use the public highways, or excluding or prohibiting any motor vehicle from the free use of such highways, or in any way affecting the use of the public highways contrary to or inconsistent with the provisions of the act. It further expressly enacts that all ordinances, rules or regulations then in force are of no validity or effect, and that all acts and parts of acts inconsistent with the Motor Vehicle Law or contrary thereto so far as they are inconsistent or contrary are repealed.

It is well settled that where a later act covers the whole subject of earlier acts and embraces new provisions, and which act plainly shows that it was intended not only as a substitute for the earlier acts, but to cover the whole subject then considered by the Legislature and to prescribe the only rules in respect thereto, it will operate as a repeal of all former statutes relating to such subject-matter, even if such former acts are not in all respects repugnant to the new act. (Pratt Institute v. City of New York, 183 N. Y., 151, and cases therein cited; Black on Interpretation of Laws, 116; Matter of Troy Press Co., 94 App. Div., 514; aff'd 179 N. Y., 529; Matter of B., Q. C. & S. R. R. Co., 185 N. Y., 171).

In this case the intention of the Legislature to repeal all laws inconsistent with and contrary to it and to make the act complete and exclusive is further shown in reserving to municipalities the right upon certain conditions to limit by ordinance, rule or regulation the speed of motor vehicles on the public highways and to make, enforce and maintain further ordinances, rules or regulations affecting motor vehicles which are offered to the public for hire. (See eople ex rel. Hainer v. Keeper of Prison, 190 N. Y., 315.)

Prior to the enactment of the Motor Vehicle Law some of the provisions now included therein were included in sections 163 and 169a of the Highway Law. On the same day that the Motor Vehicle Law was enacted said section 169a of the Highway Law was repealed and said section 163 of the Highway Law was amended by striking therefrom all reference to motor vehicles. It is claimed by the appellant that by virtue of section 32 of the Statutory Construction Law such provisions of the Motor Vehicle Law as are substantial re-enactments of the Highway Law, as it existed prior to May 3, 1904, should be considered as amendments of much Highway Law and that the Motor Vehicle Law should so far as it is a re-enactment

stitutes class legislation, for there is evidently gross misunderstanding on the part of many in regard to class legislation and its constitutionality in the United States.

The Federal Constitution prohibits the States to enact laws which deny to persons the equal protection of the State laws. This constitutional provision makes it illegal for any State to arbitrarily pick out one class of persons and legislate against them concerning any subject. But such discrimination must be arbitrary, not based upon any logical or reasonable cause for distinction in order to be illegal. Let us take an example. For a State to provide that all persons of a certain color shall be subject to certain regulations and all persons of a different color shall not be so restricted would clearly violate the constitutional prohibition. In such a case the legislation is arbitrary, and the discrimination is based upon color alone, which cannot constitute any reasonable or logical foundation for subjecting the designated class to special legislation. But in respect to subjects which require regulation because of the public welfare a different question is presented.

The State has a perfect right to legislate concerning travel on the public highways. It has a right to provide that certain vehicles which are capable of maintaining a

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of the provision previously in the Highway Law be deemed a statute of a prior date to the charter of the City of Buffalo.

The sections of the Highway Law were not in terms repealed or amended by the Motor Vehicle Law. Such repeal and amendment was by a seprate act. The intention of the Legislature is controlling. It is clear, as we have stated, that it was the intention of the Legislature to enact a new, independent and general statute relating to motor vehicles, and it should be so construed in all its parts as a statute taking effect on May 3, 1904, the date of its enactment. It prohibits the Common Council of the City of Buffalo from passing an ordinance affecting the public highways of the city contrary to or inconsistent with the provisions of such Motor Vehicle Law. See Buffalo v. Lewis N. Y. Law Journal June 1, 1908.

much higher rate of speed than other vehicles shall do certain things that the other vehicles are not required to do. The State may constitutionally regulate a certain class of vehicles, such, for example, as automobiles, and make special provisions for them, provided the law applies equally to all members of the same class. Although automobile legislation is in a popular sense class legislation, inasmuch as the laws apply to automobiles only, nevertheless, such class legislation is valid and constitutional, since there is, as has been decided by the courts, a necessity for regulating the power vehicle. So when we speak of class legislation we use a generic term, and automobile legislation is included. But if we mean illegal class legislation, then we are speaking about a very different thing and must, in order to be accurate, confine our remarks to that legislation which, according to the decisions of the United States Supreme Court, violates the constitutional provision prohibiting arbitrary discrimination. Certain automobile legislation in this country arbitrarily and unconstitutionally discriminates; for example, legislation allowing automobile owners the special privilege of using surety company's bail bonds and denying the same privilege to chauffeurs, hirers of automobiles and those who borrow machines. So also there should be no discrimination between drivers who are owners and drivers for hire who are not owners. Both classes are drivers and should be subject to the same laws without discrimination.

Municipal and State regulation.—It needs no argument to be convinced that municipal regulation of automobiling works more mischief than good, but a study of recent automobile legislation shows conclusively that the tendency is to enact State laws for the purpose of governing motor vehicle travel, notwithstanding the many mischievous attempts this year on the part of municipalities to restrict

automobiling. As examples of State legislation displacing municipal regulations we have the acts which recently have been passed in the States of *Illinois* and *Missouri.* Heretofore the automobile regulations in *Illinois* were purely local, and in *Missouri* a license had to be taken out in each county through and into which the automobilist desired to pass. Now *Missouri* has a general law and so has *Illinois.*

Concerning the right of municipalities to enact automobile regulations when there exists a general State law covering the same subject there has been much conflicting discussion. It has been held in *Wisconsin,* under a statute granting to cities the power to control the use of their streets, that an ordinance making it unlawful to drive an automobile on a street at a greater rate of speed than six miles per hour is valid, notwithstanding the State law providing that no driver in charge of an automobile shall permit it to be driven in the thickly settled portion of any city at a greater speed than one mile in five minutes, nor over any crossing faster than one mile in fifteen minutes; and also providing that cities shall have no power to pass any ordinance requiring any operator of an automobile any license or permit to use their streets, or prohibiting any automobile "the free use of such" streets. See City of Bellington v. Cissna, 87 Pac.. Rep. 481. So also, in *Pennsylvania* it has been decided that a city ordinance requiring the owner of an automobile to take out a license, and to carry a license tag, is not affected by the State act providing that every automobile owner shall obtain from the State Highway Department a license, and that license tags shall be carried exhibiting the license number and the number of the year.

From the foregoing authorities it would seem that unless a municipality is expressly or by necessary implication prohibited by the State law to regulate automobiling, it

may pass ordinances limiting the speed of automobiles and requiring licenses.

Automobiles may be excluded from a scheme of municipal taxation in the exercise of the power of a municipal corporation to classify vehicles for the purpose of a vehicle tax ordinance.[16]

So also vehicles of nonresidents who habitually use the streets of the city may be excluded from the scheme of taxation, although the vehicles belong to the same category as those subject to the tax if owned by residents.[17]

An ordinance of a city which requires the registration and numbering of automobiles, and requiring the payment of one dollar to cover the value of figures furnished by the city to form the number, was held not to constitute a license for revenue, but merely a regulation.[18]

A law requiring the registration of automobiles and the displayment of a number in the rear corresponding to the registration number does not violate a constitutional provision forbidding unreasonable searches, nor a violation of a provision declaring that no person shall be compelled in any criminal case to be a witness against himself, or be deprived of his liberty or property without due process of law.[19]

A statute of the State of *New York,* which provided for the registration of automobiles by owners, was attacked as

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16. Municipal taxation.—Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. Rep. 1027.

17. Vehicles of non-residents.—Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. Rep. 1027.

18. Distinction between revenue measure and regulation.—People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172, 12 Det. L. N. 32, 69 L. R. A. 345.

19. Constitutional provisions not violated.—People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172, 12 Det. L. N. 32, 69 L. R. A. 345.

unconstitutional, and it was contended that one of its provisions requiring a number corresponding to the number of the certificate obtained on registering the vehicle shall be conspicuously attached on the rear of the vehicle so as to be plainly visible was inoperative, and that a failure to comply with the requirement constituted no crime. Another provision of the act was claimed to be class legislation, in conflict with the Fourteenth Amendment of the Federal Constitution, because it provided that the section "shall not apply to a person manufacturing or dealing in automobiles or motor vehicles, except those for his own private use, and except those hired out." The court declared that it was not necessary to determine the competency of the legislature to discriminate in this way between dealer and manufacturer on the one hand, and private owners on the other, in using automobiles on the public highways, as the statute in its proper construction did not exempt the manufacturer or dealer when he takes an automobile which he has in stock for sale, or for repairs, or in storage, out upon the public streets, and operates it by its own power, from the duty of registering the automobile and attaching to it a tag containing the number corresponding to the certificate.[20]

The Act of 1903 of *Pennsylvania* which required the registration of automobiles was held not to be unconstitutional as lacking uniformity, because it provided that the law shall not apply "to any of the motor vehicles which

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20. New York statute.—People v. MacWilliams, 91 N. Y. App. Div. 176, 86 N. Y. Supp. 357.

Authority to enact local regulations in New York.—Buffalo v. Lewis, 123 N. Y. App. Div. 163, 108 N. Y. S. 450, *affirmed* by Court of Appeals, N. Y. Law Journal, June 1, 1908; People v. Keeper of Prison, 121 N. Y. App. Div. 645, 106 N. Y. S. 314, *affirmed* 190 N. Y. 315.

any manufacturer or vendor of automobiles may have in stock for sale and not for his private use or hire." [21]

But the section of the Pennsylvania Act of April 19, 1905, P. L. 217, so far as the exemption of "any motor vehicle which any manufacturer or vendor may have in stock, and not for hire or for his private use," is concerned, is inoperative and futile. The provision is inconsistent with the remainder of the act. None of the provisions apply to motor vehicles or automobiles at all, but only to the persons engaged in operating them.[22]

This ruling of the Attorney-General's Department of Pennsylvania is doubtful as a sound proposition of statutory construction. A provision of an act which requires owners of automobiles to take out a license is obscure where the title provides for licensing operators. The title is misleading since the owner may be one person and the operator another. Even though the legislature may have intended to license the machine or the operator, a penal statute must be taken as it is written.[23]

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21. Pennsylvania statute.—Com. v. Densmore, 29 Pa. Co. Ct. Rep. 219.

Sec. 12 of the *Pennsylvania* law being inoperative does not render the act unconstitutional. Com. v. Templeton, 22 Montg. Co. L. Rep. 203.

22. Inoperative provision of Pennsylvania act.—*In re* Automobile Acts, 15 Pa. Dist. Rep. 83; Com. v. Templeton, 22 Mont. Co. L. Rep. 203.

The Pennsylvania automobile act of April 19, 1905, P. L. 217, applies to the operator of an automobile and not to the owner.—Comm. v. David, 33 Pa. Co. Ct. Rep. 12.

23. Defective title of act.—Com. v. Densmore, 13 Pa. Dist. Rep. 639, 29 Pa. Co. Ct. Rep. 217, holding that the provisions of the Pennsylvania Act, April 23, 1903 (P. L. 268), requiring the owners of automobiles to take out licenses, was so uncertain that a conviction for the violation could not be sustained in view of the fact that there is nothing in the act as to what the license shall contain, and that the title of the act refers to the licensing of "operators" and

§ 10. Licenses.

A license to operate an automobile is merely a privilege. It does not constitute a contract, and may be revoked for cause. Some of the states have provided for revoking licenses to operate automobiles. This is a feature of the legislation in some of the States and in *England*.

The fee charged for registering an automobile is plainly a license fee and not a tax.[24]

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not "owners" of automobiles. See also *In re* Automobile Acts, 15 Pa. Dist. Rep. 83.

24. Not a tax.—Com. v. Boyd, 188 Mass. 79, 74 N. E. Rep. 255.

What an automobile license is.—It is very generally understood throughout the United States to-day that in order for one to operate a motor vehicle on the public highways in most of the States it is first necessary to procure a license to do so from the proper authorities. After having procured this license, all that the autoist cares about is his protection under it and the authority it gives him to drive his automobile. The motor car driver seldom has any occasion to consider the nature of his license and what all his rights are under it aside from the privilege given to him to use his machine. An automobile license is, however, something more than a mere formality, which can be procured by compliance with a certain amount of red tape.

The various automobile acts in the United States provide for two kinds of licenses—perpetual and annual. The perpetual license, of course, is more valuable than one that is temporary, since the latter necessitates the payment of a fee periodically, while the former may be procured and enjoyed upon the payment of but one fee. Whether the license be temporary or perpetual, it is in contemplation of law merely a license—a privilege. But what does such a license mean, and what are the legal rights of the holder under it? We might say that he has no legal rights conferred upon him by the license, and that it is negative in its operation. For without a license he is subject to arrest and criminal prosecution; with it he is immune from interference. In other words the license confers upon him a sort of negative right to be let alone if he otherwise complies with the law. This is really all that the automobilist's license amounts to. For it has been held many times by the highest courts in this country that a license does not constitute a contract within the meaning of the Federal Constitution prohibiting a State from passing

In determining the constitutionality of the New Jersey Supplement of May 26, 1905 (P. L., p. 484), to an act defining motor vehicles and providing for the registration and the regulation of the same, it is unnecessary to determine whether the registration fee required is a license fee, or a fee exacted as a reasonable charge for registering the certificate required by the act, as in either case it is clearly not a tax upon the property but an exercise of the police power.[25]

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any law impairing the obligation of contracts, and it is because a license is not a contract that it may be revoked or suspended by legislative authority.

25. Police regulation.—Unwin v. State, 64 Atl. Rep. 163, *affirmed*, State v. Unwin, 68 Atl. Rep. 110.

There is apparently much misunderstanding among automobilists in regard to the nature of the fees which are imposed by our motor vehicle registering and licensing laws. It should be understood at the outset that these fees, which owners and drivers are compelled to pay, do not constitute taxes upon property. The State of New Jersey does not tax automobiles as property. The New Jersey exactions are merely license fees, if they can be held not to exceed a reasonable sum. If it can be shown that the fees are greater than seems to be reasonable, they constitute a tax upon property for residents and a tax upon transit against non-residents. Property taxation does not in any form enter into the theory of the New Jersey Motor Vehicle Law.

Whether the amount of the registration fee is based upon the horse power or is determined by some other reasonable method is immaterial, provided an unreasonable sum is not charged for the license, considering what the expenses are to maintain the motor vehicle department. This is a simple rule of the law of taxation and is easily applied.

It is indeed strange that in the State of New York all that any automobile owner needs to pay is $2, which payment is final and entitles the owner to a perpetual license. There are probably more automobiles in the State of New York than in any other jurisdiction of the United States, still this fee of $2 has proven to be adequate for the support of the department issuing licenses to owners and chauffeurs. In New Jersey the owner of a 30 horse power automobile is compelled to pay $10 annually and $4 every year for the

§ 11. Operation and effect of license.

Even after having obtained authority to operate one's car in the state, county, or city, the license is a protection only within the jurisdiction of the authorities granting it. Thus, where a *Missouri* statute provided that any person desiring to operate an automobile in a city must procure a license from the license commissioner thereof, and if he desires to operate it in the county outside the city limits he shall procure a license from the county clerk of such county, it was held that the owner of an automobile was required to take out a license in each and every county over the roads of which he desires to operate his automobile.[26]

Of course the rule here stated must be considered as inapplicable to state registration and licensing where, by statute, nonresident licensed and duly registered motorists are exempted. In some of the states it is provided that machines owned by nonresidents and driven by persons residing and registered in some other state may be operated on the public highways and streets.

§ 12. Exemption of nonresidents.

In regard to the necessity of taking out licenses in certain states by one who is duly licensed in his own jurisdiction and who contemplates a tour, under the laws of this country, taking, for example, the act of the State of *New*

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privilege of driving. The $2 paid by an owner to the State of New York not only pays for the registration of his vehicle, but also entitles him to drive on the public highway. There is a great discrepancy between these figures. The value of motoring is no more in New Jersey than it is in New York, still its cost is higher in the former State.

26. Scope of license.—State v. Cobb, (Mo. App. 1905) 87 S. W. Rep. 551.

York as typical, a nonresident who lives without the jurisdiction of the United States is not exempted in that State. The *New York* statute reads:

> "The provisions of this section shall not apply to motor vehicles owned by non-residents of this State, *provided the owners thereof have complied with any law requiring the registration of owners of motor vehicles in force in the State, Territory or Federal district of their residence,* and the registration number showing the initial of such State, Territory or Federal district shall be displayed on such vehicle substantially as in this section provided."

Under this law, and the other similar State laws, it will be seen that in order for one to be exempt from complying with the automobile registration and licensing provisions in the State of New York he must be an owner registered in another *State, Territory, or Federal district,* at the place of his residence, and the words "*State,*" "*Territory*" or "*Federal district*" in this statute do not include the *Dominion of Canada* or any of the *Canadian Provinces* or any other foreign territory. No doubt in the practical administration of the automobile laws in the United States, Canadians and other foreigners who are duly licensed at home are permitted to drive into and through the States of this country, but there is no authority for this exemption. We are not permitted to motor in parts of Canada without taking out an additional license, and it is even required that we shall put up a bond covering any injury that we might commit.

It will also be noticed that under the usual nonresident provision chauffeurs who are licensed at home cannot drive into another State without taking out a local license; neither can hirers or borrowers of machines do this. It will also be noticed that in order for the exemption to

apply, the automobilist must be registered in the State of his residence. If he resides in *Rhode Island* and does business in *Connecticut,* in which latter State he has taken out a license, under the strict letter of the *New York* law he cannot drive into that State because he is not licensed in the state of his residence, no matter how technically his residence may be in *Rhode Island.*

It may reasonably be asked if our nonresident exemptions are logical or even intelligent.

§ 13. Exemption based upon reciprocity.

Several states have considered legislation providing for the exemption of nonresident automobilists registered in their home states, provided these latter states grant the same privilege in return.

Such a legislation would be unconstitutional, because the reciprocity condition conflicts directly with that clause of the Federal Constitution which prohibits a state to discriminate against nonresidents merely because their home state does not reciprocate the privileges granted. The state has the right to require all nonresident automobilists to take out a local automobile license, but it cannot pick out and discriminate against motorists whose home State does not grant exemption privileges to nonresidents.

The theory of this legislation seems to be founded on the fact that a state may regulate the right of a foreign corporation to do business within its jurisdiction, and may compel it to take out a local license. Retaliatory legislation depriving corporations of another state of the right to do business unless a similar privilege is granted by that other state has been common in this country, and does not conflict with the Constitution, since a corporation has no right to migrate into another state unless permission is given it to do so. Consequently, the state can entirely

prohibit the corporation from entering its jurisdiction, which includes the right of prohibiting entry into its jurisdiction under certain conditions.

Automobilists are not corporations, however. Every citizen of this country has the inviolable right to travel into and through any state he wishes as long as he complies with the laws governing the local inhabitants. Any law discriminating against nonresidents under certain conditions, depending upon the action of the home state of these nonresidents, is null and void. So let those who contemplate introducing automobile legislation with such a provision strike out the objectionable part, and provide for either total exemption, non-exemption or exemption for a limited time, with no unconstitutional reciprocity condition.

CHAPTER VI.

OPERATION ON HIGHWAY—IN GENERAL.

§ 1. Right to operate on the highway.

This chapter is intended to treat of the subjects herein discussed in a general way merely. The various topics will be more particularly considered in subsequent chapters.

The owner of an automobile has a right to use the highway provided that he does not violate the law in so doing.[1] The law does not denounce motor carriages as such on the

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1. **Right to use highway.**—Christie v. Elliott, 216 Ill. 48, 1 L. R. A. (N. S.) 124, 74 N. E. Rep. 1035; Chicago v. Banker, 112 Ill. App. 94; Shinkle v. McCullough, 116 Ky. 960, 965.

public ways. For so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation with reasonable safety to travelers by ordinary modes, they have equal right with other vehicles in common use to occupy the streets and roads.[2] Their use, nevertheless, should be accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with their safety.[3]

§ 2. Care in operating—Restive horses.

The rule of the common law is and always has been that, although a person might travel the highway with a conveyance which is likely to frighten horses, yet, while doing so, he must exercise reasonable care to avoid accident and injury to others traveling along the highway.[4] The fact that motor vehicles are novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting the use of automobiles.[5] It is the duty of one operating a motor car to

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2. Equal rights.—Indiana Springs Co. v. Brown, 74 N. E. 615.

3. Prudence in management.—Shinkle v. McCullough, 116 Ky. 960, 965.

4. Reasonable care.—Murphy v. Wait, 102 N. Y. App. Div. 121, 92 N. Y. Supp. 253.

See also Upton v. Windham, 75 Conn. 288, 293, where the court said: "The passing of an automobile driven with ordinary care and at a reasonable speed, and the fright and shying of a gentle horse, constitute one of those events in the proper use of the highway calling for its maintenance in a safe condition . . ."

5. Unusual in appearance immaterial.—Indiana Springs Co. v. Brown, 74 N. E. 615, 616, where it was said: "In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no re-

take all proper precautions against frightening horses or other domestic animals met on the highway.[6] The quantum of care required is to be estimated by the exigencies of the particular situation; that is, by the place, presence, or absence of other vehicles and travelers; whether the horse driven is wild or gentle; whether the conveyance or power used are common or new to the road; the known tendency of any feature to frighten animals, etc.[7] If the operator knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control has so far excited a horse as to render the horse dangerous and unmanageable, it is the motorist's duty to stop his automobile and take such other steps for the other traveler's safety as ordinary prudence might suggest.[8] To drive a noisy machine at a high rate of speed so that a traveler's horse is frightened is negligence and renders the motorist liable to damages.[9] To drive an automobile at a speed of

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covery, provided the contrivance is compatible with the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of conveyance, that concerns the courts. It is improper to say that the driver of the horse has rights in the road superior to the driver of the automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury as well as inflicting injury upon the other."

6. Frightening horses.—Shinkle v. McCullough, 116 Ky. 960, 965; Indiana Springs Co. v. Brown, 74 N. E. 615.

7. Quantum of care.—Indiana Springs Co. v. Brown, 74 N. E. 615, 616.

8. Duties of automobile drivers.—Shinkle v. McCullough, 116 Ky. 960, 965.

9. Speed and noise.—Shinkle v. McCullough, 116 Ky. 960. See also Mason v. West, 61 N. Y. App. Div. 160. Whether a motor car is a nuisance or not is a question for the jury. See Barlow, The Law of Mechanical Traction on Highways, p. 276.

twenty miles an hour towards a horse and carriage on a narrow approach to a bridge, whence there is no escape for the horse except by proceeding forward to a cross street, and, though seeing the terror of the horse and its driver's signals to stop, to refuse to slacken its speed, and thus to cause the horse to run away, is an unwarrantable use of the highway, rendering the motorist liable for damages.[10] It is a common statutory provision at the present time to require a motorist to stop upon a signal by the driver of a horse or other domestic animal, and to remain stationary long enough to allow the horse or domestic animal to pass. A motorist must obey such a statute or be liable for the consequences.[11] Independently of such a statute, or the giving of a signal, the automobilist should stop when he sees that he is frightening a horse by proceeding.[12] Under a statute providing that "whenever it shall appear that any horse driven or ridden by any person," etc., is about to become frightened, the motorist shall stop, etc., it is proper to instruct the jury that if it might appear to the motorist, by the exercise of reasonable diligence, that the horse was about to become frightened, it would be the motorist's duty to stop.[13] A finding of negligence on the part of a defendant, driver of an automobile, is not authorized by evidence that, when at the top of a hill he saw the plaintiff's team at the foot of it, he disconnected the engine from the running gear of his

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10. Liability for damages.—Indiana Springs Co. v. Brown, 74 N. E. 615.

11. Obeying statute.—Murphy v. Wait, N. Y. App. Div. 121, 92 N. Y. Supp. 253.

12. Duty to stop.—Christy v. Elliott, 216 Ill. 31, 1 L. R. A. (N. S.) 124, 74 N. E. Rep. 1035.

13. When motorist should stop.—Christy v. Eliott, 216 Ill. 31, 45, 1 L. R. A. (N. S.) 124, 74 N. E. Rep. 1035.

machine, and ran down by gravity, at a speed of three or four miles an hour, passing the team five or six feet from it, without stopping, though just as he was opposite it the horse swerved and threw the plaintiff out; the horse till then having given no sign of restiveness, and the plaintiff having given the defendant no signal to stop.[14] Of course those persons using horses which they know to be unmanageable may be liable for contributory negligence and so lose their right of action.

§ 3. The law of the road—In general.

A highway is for the use of the public at large; indeed it has been defined to be a road which every citizen has a right to use. This being so, it is necessary that the travel and traffic on the highway shall be governed by certain laws that the rights of each citizen may be certain of protection. The rules by which travel on highways are governed in English speaking countries are called "The law of the road.[15] These rules were established by custom in

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14. Negligence.—Davis v. Maxwell, 108 App. Div. 128, 96 N. Y. Suppl. (130 St. Rep.) 45, holding that where the court instructed that if the defendant drove his machine down toward the plaintiff at the speed and in the threatening manner claimed by the plaintiff the jury might determine whether the defendant was negligent, but did not instruct as to how they should consider the defendant's conduct if he passed as he testified, a new trial should be granted; an inference of negligence not being authorized from the manner of passing testified to by defendant, and it being likely that the jury concluded that though he passed as he testified he was negligent in passing without stopping and nearer than necessary. See Harris v. Nubbs, L. R. 3 Exch. Div. 268, 273.

15. The law of the road.—Angell, Highways, sec. 2.

"The fundamental idea of a highway is not only that it is public for free and unmolested passage thereon by all persons desiring to use it,—all the inhabitants of the said township, and of all other good citizens of the commonwealth going, returning, passing and repassing, in, along, and through the highway. The use of a highway

England,[16] and so were they established in this country, for, although a number of states have statutes prescribing these rules, these statutes are for the most part merely declarative of what had already become an established custom.[17] Proof of the custom is not necessary, for the court will take judicial notice of its existence.[18]

§ 4. Vehicles meeting and passing.

The first and not the least important class of cases to which the law of the road applies is where two vehicles approach, meet, and pass one another on the highway. In England and Canada the primary rule is that when two vehicles meet each should keep to the left. In this country the universal rule is, as every one knows, that each of two vehicles which meet should keep to the right.[19] Custom in this country generally requires that each of two vehicles approaching and meeting should pass on the right of the center of the traveled portion of the highway,[20] or at least to keep sufficiently to the right to afford a safe and free passage to the other vehicle.[21] This rule has been

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is not a privilege, but a right, limited by the rights of others and to be exercised in a reasonable manner." Radnor Tp. v. Bell, 27 Pa. Super. Ct. 1, 5.

16. Origin of law.—Angell, Highways, sec. 333.

17. Statutes declaratory.—Elliott, Roads and Streets, (2d ed.) sec. 828.

18. Judicial notice.—Elliott, Roads and Streets, (2d. ed.) sec. 830.

19. Keeping to right.—Angell, Highways, sec. 328; Palmer v. Baker, 11 Me. 338; Jaquith v. Richardson, 8 Met. (Mass.) 213; Easring v. Lansingh, 7 Wend. (N. Y.) 185; Smith v. Dygert, 12 Barb. (N. Y.) 613.

20. Keeping to right of traveled highway.—Cooley, Torts, p. 666.

21. Safe passage of vehicles.—Wilson v. Rockland, 2 Harr. (Del.) 67.

enacted by statute in many states, the usual requirement being to turn to the right of the center of the road.[22] The phrase "center of the road," as used in these statutes, has been held to mean the center of the traveled or wrought part of the road.[23] When the highway is covered by snow, travelers who meet must turn to the right of the beaten or traveled part of the road since it was covered by snow, irrespective of the position of what is the wrought or traveled part of the road when not covered by snow.[24] This rule to turn to the right of the center of the road applies to vehicles passing on the same side of roads and streets which are so wide that to pass safely there is no necessity to turn to the right of the center line.[25] The statutes usually require that vehicles which meet on the highway shall seasonably turn to the right.[26] This require-

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22. Turn to right of center of road.—See for example.—Cal. Pol. Code, sec. 2931; Diehl v. Roberts, 134 Cal. 164, 66 Pac. 202; Ill. Rev. St., ch. 121, sec. 77; Dunn v. Moratz, 92 Ill. App. 277; Mass. Pub. St., ch. 93, sec. 1; New York Highway Law, sec. 157 (2 Birdseye Sts. 1638); Wright v. Fleischman, 41 Misc. 533, 85 N. Y. Suppl. 62.

A statute requiring the turning to the right of the center of the road is only a recognition of the common-law rule of the road, which would exist without statutory enactment. Wright v. Fleischman, 41 Misc. 533, 85 N. Y. Suppl. 62.

23. Center of road.—Clark v. Com., 4 Pick. (Mass.) 125. See, however, Daniel v. Clegg, 38 Mich. 32, holding that the phrase "traveled part of the road" in such a statute means that part which is wrought for traveling, and is not confined simply to the most traveled wheel track.

24. When highway is covered with snow.—Jacquith v. Richardson, 8 Metc. (Mass.) 213; Smith v. Dygert, 12 Barb. (N. Y.) 613.

25. Applicability of rule.—Wright v. Fleischman, 41 Misc. 533, 85 N. Y. Suppl. 62.

26. Seasonably turn to right.—See for example Ill. Rev., Sts., ch. 121, sec. 77; Cal. Pol. Code, sec. 2931; N. Y. Highway Law, sec. 157 (2 Birdseye Sts. 1644).

ment has been held to mean that each should turn to the right in such season that neither shall be retarded by reason of the other's occupying his half of the way.[27] It has been held that it is not necessary for a person to turn to the right so that all of his vehicle is on the right of the center of the highway. If he turns out far enough so that another vehicle may pass safely without turning out at all, the statute has been sufficiently complied with.[28]

§ 5. Rule not inflexible, but is a rule of negligence.

Properly considered, the rule of the road is a rule of negligence, and the fact that a person was on the wrong side of the road when a collision took place does not *per se* make him liable for damages, but his liability is determined by the rules of law applicable to cases of negligence.[29] The rule is not an inflexible one, and a deviation therefrom is often proper and sometimes necessary,[30] and a too rigid adherence to the rule, when injury might have been averted by variance therefrom, may render a traveler liable.[31] A deviation from the rule is often necessary in the crowded

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27. Meaning of rule.—Neal v. Randall, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668.

28. Compliance with statute.—Buxton v. Ainsworth, (Mich.) 101 N. W. 817, 11 Det. Leg. N. 684.

29. Negligence.—Neal v. Randall, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668; Palmer v. Barker, 11 Me. 338; Parker v. Adams, 12 Metc. (Mass.) 416; Brooks v. Hart, 14 N. H. 307.

30. Rule not inflexible.—Turley v. Thomas, 8 Carr. & Payne 103.

Custom requires a vehicle to keep to the right unless circumstances require it to go to the left. Lee v. Foley, 113 La. 663, 37 So. 594.

31. Johnson v. Small, 5 B. Mon. (Ky.) 25; Smith v. Gardner, 11 Gray (Mass.) 418; Brooks v. Hart, 14 N. H. 307; O'Malley v. Dorn, 7 Wis. 236; Allen v. Mackay, 1 Sprague (U. S.) 219; The Commerce, 3 W. Rob. 295.

streets of a metropolis, [32] and it has been held that when a light vehicle meets and passes one heavily laden it should yield to the heavier vehicle,[33] which however, ought to stop, if reasonable care requires it, to give the lighter vehicle opportunity to pass.[34] Moreover it is self-evident that a vehicle may occupy any part of the road so long as that particular portion is not being used by another; [35] but it is equally clear that a person who has his vehicle in that situation is bound to use more care and caution against collision with any other vehicle he may chance to meet than if he were pursuing his course according to the law of the road,[36] and when the other vehicle approaches, he must, at least in the great majority of cases, seasonably turn to his own side of the road; [37] for in taking the wrong side of the street he might generally be held to have assumed the risk of consequences which may rise from his inability to get out of the way of a vehicle on the right side of the street, and is responsible for injuries sustained by the latter while exercising due care.[38]

§ 6. Presumption arising from disobedience.

If, however, a collision take place, the presumption is against the person on the wrong side of the road,[39] and his

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32. Deviation from rule.—Wayde v. Carr, 2 Dow. & Ry. 255. **Greater care required** of driver on the wrong side of the road. N. Y. Transp. Co. v. Garside, 157 Fed. Rep. 521.

33. Heavy vehicles.—See Lee v. Foley, 113 La. 663, 37 So. 594.

34. Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249.

35. Parker v. Adams, 12 Metc. (Mass.) 403; Daniel v. Clegg, 38 Mich. 32.

36. Pleickwell v. Wilson, 5 Carr. & Payne, 103.

37. Parker v. Adams, 12 Metc. (Mass.) 403; Daniel v. Clegg, 38 Mich. 32.

38. Responsibility for being on wrong side of road.—Fahrney v. O'Donnell, 107 Ill. App. 608.

39. Presumption.—Cooley, Torts, p. 666; Daniels v. Clegg, 28 Mich. 32; Brooks v. Hart, 14 N. H. 307; Buxton v. Ainsworth,

traveling thus contrary to the law is *prima facie* evidence of negligence on his part,[40] especially if the accident happen in the dark.[41] The presumption is not, however, conclusive.[42] If it be overcome by evidence of these circumstances, or if it appear that the fault, if found, did not essentially contribute to the injury in question, the fact that the traveler may have been in a sense out of place does not place him beyond the protection of the law.[43] Thus, if one is obliged by reason of an obstacle in the road to go to the wrong side of the highway and his vehicle collides, without his fault, with that of another, there is no liability as against him who took the wrong side of the road.[44]

§ 7. Where one traveler overtakes and passes another.

In England the traveler who overtakes and passes another must pass on the off side of the forward traveler, who should, at the same time, go to the left. It is said that

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(Mich.) 101 N. W. 817, 818, 11 Det. Leg. N. 684; Perlstein v. American Export Co. 177 Mass. 730, 59 N. E. 194, holding that evidence that plaintiff was not on the right side of the street, close to the sidewalk, and that the other vehicle was going very fast in the opposite direction when the collision took place was sufficient, when unexplained, to indicate negligence.

40. Prima facia negligence.—Steele v. Burkhardt, 104 Mass. 59; Spofford v. Harlow, 3 Allen (Mass.) 176; Burdick v. Worrall, 4 Barb. 596. See, however, Foot v. American Produce Co., 195 Pa. 190, 49 L. R. A. 764, holding that a city ordinance requiring a vehicle to travel on the right side of the street could be considered with other evidence, but that in itself it was not sufficient evidence of negligence of one going on the other side.

41. Accident in dark.—Angell v. Lewis, 20 R. I. 391, 39 Atl. 521.

42. Riepe v. Elting, 89 Iowa 82, 56 N. W. 285, 26 L. R. A. 769.

43. Buxton v. Ainsworth, (Mich.) 101 N. W. 817, 818, 11 Det. Leg. N. 684.

44. Compelled to travel on wrong side.—Strouse v. Whittlesey, 41 Conn. 559.

in this country there is no rule regulating how the overhauling vehicle should pass the one in front.[45] It is doubtful, however, if it can be said that there is no rule fixing a way the following vehicle should pass the one ahead. It is customary in many parts of the country for the vehicle in the rear to pass on the left side; that is, just the opposite from the English rule; and it is perfectly apparent that this custom is dictated by common sense. This has been recognized in some of the recent automobile laws.[46] Nevertheless it has been held that the law of the road applies only to travelers who approach each other from opposite directions,[47] and that the advance traveler is under no obligation to turn to either side to allow the following traveler to pass.[48] In *Louisiana* it has been held that the driver or owner of the rear vehicle passes, at his peril, the forward one, and is responsible for all damage caused thereby.[49] Even though there may be a set rule how a following vehicle should pass the one in front, it would seem that such a rule, like the one covering vehicles approaching from opposite directions, will be merely a rule of negligence, and the liabilities of parties would be subject to the law of negligence. In fact it has been held that the driver of a vehicle who sees a team on the run overtaking him, but not having any reason to believe that the driver had lost control of his team, was not guilty of contributory negligence in not turning out, where there was plenty of room for the team to pass.[50]

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45. Angell, Highways, sec. 340.
46. See N. Y. Automobile Law of 1903.
47. Bolton v. Colder, 1 Watts (Pa.) 360.
48. Bolton v. Colder, 1 Watts (Pa.) 360.
49. Avegno v. Hart, 35 La. Ann. 235.
50. Elenz v. Conrad, 123 Iowa 522, 99 N. W. 138.

§ 8. Collision—Contributory negligence.

As in other cases of negligence, a traveler injured by a collision on the highway must be free from contributory negligence,[51] and where a suit is brought plaintiff must prove both care on his part and want of care on the part of the defendant.[52] Under this rule it has been held that the proof of unskilful or reckless driving will prevent plaintiff's recovery if his conduct has actually contributed to the injury.[53] Furthermore, it is clear that the traveler whose part of the way is trenched upon by another cannot, for that reason, carelessly and imprudently rush upon the other party, or his vehicle, and if he sustain an injury recover damages therefor. He may probably attempt to pass if such attempt would be reasonably safe and prudent. If otherwise, he must delay, and seek redress for the detention if damage result therefrom.[54] But no negligence on plaintiff's part which does not contribute to the injury will prevent his recovery.[55] Thus negligence of the driver in the

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51. McLane v. Sharpe, 2 Harr. (Del.) 481; Larrabee v. Sewell, 66 Me. 376; Parker v. Adams, 12 Met. (Mass.) 415; Daniels v. Clegg, 28 Mich. 32; Wynn v. Allard, 5 Watts & S. (Pa.) 524; Wood v. Luscomb, 23 Wis. 287; Brooks v. Hart, 14 N. H. 307; Drake v. Mount, 33 N. J. L. 441; Moody v. Osgood, 54 N. Y. 488; Pluckwell v. Wilson, 5 Car. & P. 375; Williams v. Holland, 6 Car. & P. 23; Wayde v. Lady Carr, 2 Dowl. & R. 255; N. Y. Transp. Co. v. Garside, 157 Fed. Rep. 521.

52. Kennard v. Burton, 25 Me. 39; Carsley v. White, 21 Pick. (Mass.) 234; Rathbun v. Payne, 19 Wend. (N. Y.) 399; Butterfield v. Boyd, 4 Blatchf. (U. S.) 356.

53. Peoria Bridge Assoc. v. Loomis, 20 Ill. 235; Pittsburg Southern R. Co. v. Taylor, 104 Pa. 306; Acker v. Anderson County, 20 S. C. 495; Cassedy v. Stockbridge, 21 Vt. 391; Flower v. Adam, 2 Taunt. 314.

54. Brooks v. Hart, 14 N. H. 307, 313.

55. Kennard v. Burton, 25 Me. 39; Parker v. Adams, 12 Metc. (Mass.) 415; Clay v. Wood, 5 Esp. 44; Chaplin v. Hawes, 3 Car. & P. 555; Wayde v. Lady Carr, 2 Dowl. & R. 255.

management of his vehicle after a collision caused by defendant's negligence will not relieve defendant from liability, unless plaintiff's act actually contributed to the result.[56]

§ 9. Rights of footmen and vehicles—Children in the street.

The rights of footmen and drivers in the highway are equal and both must exercise such care as circumstances demand.[57] A motorist is bound to anticipate that he may meet persons at any point in a public street. He must, therefore, keep a careful lookout for them and have his car under such control as will enable him to avoid injury to any one and, if necessary, he must slow up and even stop.[58] An adult or an infant has the right to assume that the operator of an automobile will exercise care and respect the rights of pedestrians when there is occasion to turn a corner. Due care requires in such circumstances that the vehicle should be slowed down and operated with care. At such a place the operator is bound to take notice that people may be at the crossing; and this obligation on his part is one which a pedestrian has a right to assume will be observed.[59] If the motorist meets children of tender years in the street he is required to exercise more than ordinary care to avoid accident.[60] The mere fact that a six-year-old boy, run over by a motor car, was found in the street, and played on the street, is not *per se* negligence on the part of his parents, but whether his parents were negligent is a question for the jury.[61] It is not the duty of a driver to

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56. Belk v. People, 125 Ill. 584.

57. Footmen.—Elliott, Roads and Streets, sec. 834.

58. Thies v. Thomas, 77 N. Y. Supp. 276.

59. Buscher v. New York Transportation Co., 94 N. Y. Supp. 798.

60. Thies v. Thomas, 77 N. Y. Supp. 276.

61. Thies v. Thomas, 77 N. Y. Supp. 276.

keep a lookout behind to see whether children are climbing on the rear of his vehicle. It is his duty to look ahead.[62] That the peculiarity of his vehicle excites the desire of children to climb upon it does not alter the case.[63] In an action for the death of a boy run over by a motor car, the fact that the accident did not happen at a street crossing, but at a point between blocks, may be considered by the jury on the issue of negligence.[64] It must affirmatively appear that plaintiff was not guilty of contributory negligence.[65] In an action to recover for the death of a six-year-old boy, it is a question for the jury whether his playing on the street was contributory negligence.[66] If an automobile comes upon a boy in such a way as to produce terror, and his fear causes an error of judgment by which he runs in front of the automobile, he is not guilty of contributory negligence.[67]

§ 10. Injury resulting from fright.

In an ordinary case of injury through the reckless driving of an automobile on the highway, the rules of liability are well settled and comparatively simple. Let us suppose, however, a case of a person who is walking on the street or highway and a motor car is so recklessly driven that he, through no fault of his own, suffers, from fright, a severe nervous shock which seriously injures him, the injury being due solely to the fright thus caused, not to any immediate physical injury from the car. Has he any ground for recovery? Very high American authority, followed in several States, is against recovery upon these facts.[68] This

62. Hebard v. Mabie, 98 Ill. App. 543.
63. Hebard v. Mabie, 98 Ill. App. 543.
64. Thies v. Thomas, 77 N. Y. Supp. 276.
65. West v. New York Transportation Co., 94 N. Y. Supp. 426.
66. Thies v. Thomas, 77 N. Y. Supp. 276.
67. Thies v. Thomas, 77 N. Y. Supp. 276.
68. Mitchell v. Rochester Ry. Co., 151 N. Y. 107.

conclusion was reached by starting with the sound proposition that damages are not recoverable for mere fright. "Fear," says Sir Frederick Pollock, "taken alone falls short of being actual damage, not because it is remote or unlikely consequence, but because it can be proved and measured only by physical effect."[69]. But from the proposition that recovery could not be had for fright alone the court reasoned that no recovery can be had for injuries resulting therefrom. "That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences."[70] This reasoning has been criticised and seems to have been overthrown in a well-known English case.[71] In that case the court said: "No doubt damage is an essential element in a right of action for negligence. I cannot successfully sue him who has failed in his duty of using reasonable skill and care towards me unless I can prove some material and measurable damage. If his negligence has caused me neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constituent of a right of action for negligence is lacking. * * * It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is, without resulting damage, as insufficient a ground of legal claim as the infliction

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69. Pollock, The Law of Torts, p. 51.

70. Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 109, 110.

71. Dulien v. White, 2 K. B. 669.

of fright. That fright—where physical injury is directly produced by it—cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority. * * * If, as must be assumed here, the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact?[72] In connection with the compelling reasoning of the English court, we should remind ourselves that it is settled law, as we have already seen, that if a horse be frightened by the negligent operation of an automobile upon the highway, and physical injury results directly from the fright of the horse, a good cause of action lies. If an action lies for damages resulting from the fear of an unreasonable animal, an animal without a grain of sense when its fear is aroused, on what principle can we say that damages cannot result from the fear of an individual? Of course not every shock which produces physical injury gives cause of action to the sufferer. The nervous shock must be one which arises from a reasonable fear of immediate personal injury to oneself.[73]

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72. Dulien v. White, 2 K. B. 669, 673, 675, where a woman who was pregnant was sitting behind the bar of the public house of her husband and a pair-horse van was driven into the public house and she sustained a severe nervous shock and gave premature birth to the child she had been carrying and the child born was, in consequence, an idiot.

73. Dulien v. White, 2 K. B. 669, 675, where the court said: "A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C."

§ 11. Roadworthiness of vehicle, tackle, or gearing.

It is the duty of a motorist to have "good tackle" and gearing, and to have his car in good condition for the road, that he may thus avoid, as much as possible, the chance of causing injury to others.[74] The mere fact that some of the gearing gave way, or that some part of the vehicle broke down, and injury resulted, would not be negligence *per se*.[75] "If damages are inflicted by reason of the breaking of the carriage or tackle of the traveler on the highway the traveler or owner of the tackle is liable only on the principle of want of ordinary care."[76] The fact that gearing or tackle acted wrongly on a previous occasion is evidence of negligence on the part of the owner, and may be sufficient to render him liable for damages caused thereby.[77]

§ 12. Street crossings, crossroads.

At the crossing of two highways travelers on both roads or streets have equal rights, and each traveler is bound to exercise ordinary care to avoid injury to others.[78] If a person injured in crossing a street failed to exercise ordinary care and prudence for his own safety, it is nevertheless proper to leave to the jury the question whether, if the driver of vehicle by which he has been injured had been watchful, he could have discovered the peril to which plaintiff was exposed in time to have avoided injury.[79]

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74. Welch v. Lawrence, 2 Chitty 262; Johnson v. Small, 5 B. Mon. (Ky.) 25; Smith v. Smith, 2 Pick. (Mass.) 621; Murdock v. Warwick, 4 Gray (Mass.) 178.

75. Doyle v. Wragg, 1 F. & F. 7; The European, 10 L. R. Prob. Div. 99.

76. 1 Thompson Negligence, p. 81. See also Elliott, Roads and Streets.

77. The European, 10 L. R. Prob. Div. 99.

78. Gilbert v. Burque, 72 N. H. 521, 57 Alt. 97.

79. Duter v. Sbaren, 81 Mo. App. 612.

§ 13. Vehicles standing on the highway.

Under many circumstances the owners of vehicles have the right to let them stand on the highway for a reasonable time and in such a place as will not unduly interfere with travel on the road. When, therefore, a motor car is lawfully standing on the side of the street and there is ample room to pass without colliding with it, it is negligent to drive into it.[80] When, however, the person in charge of a motor car leaves it upon the street it is his duty to take all reasonable care that no injury will result during the time the machine is there, especially if the car be left standing alone with no person in charge of it. It is not his duty before leaving the car to chain it to a post or in some manner to fasten it so that it would be impossible for it to be started by a third person.[81] If, during the absence of the person in charge of the car and after he had turned off the power and applied the brake, the car be started by the willful act of two small boys and collide with a wagon, the unauthorized interference and act of the boys is the proximate cause of the injury and the owner of the car is not liable.[82]

§ 14. Liability of owner for acts of person operating car.

Undoubtedly the owner of a motor car is liable for the acts of his servant who is managing it while acting as an employee and within the scope of his employment. The owner is not, however, liable where the proximate cause of the injury was not the acts of his servant, but the intermeddling of a third person.[83] A dealer in automobiles can-

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80. Odom v. Schmidt, 52 La. Ann. 2129. 28 So. 350.

81. Berman v. Schultz, 84 N. Y. Supp. 292.

82. Berman v. Schultz, 84 N. Y. Supp. 292.

83. Berman v. Schultz, 84 N. Y. Supp. 292. See suppra, ch. VI., sec. 11.

not be held liable for the act of his son who was also an employee, but not acting as such at the time, and who was using his father's car without the latter's consent or knowledge.[84]

§ 15. Speed regulations.

An act regulating the speed of automobiles is not unconstitutional as class legislation.[85] In *Pennsylvania* a township of the first class has the power, under the act of April 18, 1899, P. L. 104, to pass an ordinance fixing the maximum speed of motor cars at ten miles an hour, and the power is not suspended by Act of April 23, 1903, P. L. 268, which allows motor cars to maximum speed of twenty miles an hour outside of cities and boroughs.[86] In *Massachusetts* the Boston park commissioners have power to make rules for the use and government of the parkways under their control.[87] One who is controlling the motive power of an automobile may be said to be driving it within the meaning of a rule, made by a board of park commissioners, that no person shall "ride or drive" in a certain parkway at a rate of speed exceeding eight miles an hour.[88] Under a statute forbidding the driving of a motor car at any speed greater than is reasonable and proper, having regard to the traffic on the highway, a finding that a speed of eighteen miles an hour was excessive was correct, although there was no direct evidence that any traffic was interrupted, interfered with, incommoded, or affected; for the phrase "having regard to the traffic on the highway" meant having regard

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84. Reynolds v. Buck, (Iowa) 103 N. W. 946.

85. Christy v. Elliott, 216 Ill. 31, 1 L. R. A. (N. S.) 124, 74 N. E. Rep. 1035 [*construing* Act of May 13, 1903].

86. Radnor Tp. v. Bell, 27 Pa. Super. Ct. 1.

87. Com. v. Crowninshield, 17 Mass. 225.

88. Com. v. Crowninshield, 17 Mass. 225.

to the traffic on the road, not to the traffic in the immediate vicinity of the motor.[89] Upon the elementary principle that before a person can be legally convicted of a crime he is entitled to be informed of precisely the charge made against him, a conviction of the violation of a highway law cannot be affirmed on the ground that defendant violated a section of the Penal Code.[90]

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89. Smith v. Boon, 84 L. T. 593 [*construing* The Light Locomotives on Highways Order, art. 4]. See also Mayhew v. Sutton, 86 L. T. 18. Other cases under this act are Rex v. Wells, 91 L. T. 98; Throughton v. Manning, 92 L. T. 855. See article "Prohibiting Reckless Motoring," Canadian L. Rev., February, 1906.

90. People v. Ellis, N. Y. App. Div. 471, 472. The following were the provisions of the highway law in question: "Section 163 and 169*a* of the Highway Law (Laws of 1890, ch. 568), as amended by chapter 625 of the Laws of 1903, provided as follows:

"Sec. 163 . . . No ordinance, rule or regulation adopted by the authorities of any city in pursuance of this section or of any other law shall require an automobile or motor vehicle to travel at a slower rate than eight miles per hour within the closely built up portions of such city, nor at a slower rate of speed than fifteen miles per hour where the houses in such city upon any highway are more than one hundred feet apart. . . .

"Sec. 169*a*. . . . Any person who shall violate any of the provisions of this statute, or of any speed ordinance adopted pursuant hereto, upon conviction thereof, shall, in addition to the penalties provided in section one hundred and sixty-nine *b*, be further punished for a first offense by a suspension of his right to run an automobile for a period of not less than two weeks."

It was held that such sections of the Highway Law do not purport to fix a rate of speed or make it a crime to exceed any particular rate, but that they simply operate to prevent the authorities of a city from fixing a lower rate of speed for automobiles than eight miles an hour.

That an information which states that defendant propelled an automobile through the closely built portion of the city of New York at a speed of eighteen miles an hour is not permitted by any ordinance of said city, "wherefore, deponent charges defendant with having violated chapter 625 of the Laws of 1903," does not charge the commission of a crime.

§ 16. Injuries resulting from defects in highway.

In practically all of the states the municipalities and towns or townships are made responsible for injuries resulting from the unsafe condition of the highway. The liability is usually prescribed by statute, and the extent of liability is defined by the statute creating it. Where a statute provides that highways shall be kept in a reasonably safe condition for travelers with horses, teams, and carriages, the word "carriages" includes motor cars or automobiles.[91] It has been held that in an action for injuries from a defect in the highway the question was not whether the town used ordinary care in construction and repair of its highway, but whether as a result the road as constructed and maintained was in fact reasonably safe for travelers.[92] But the duty of a municipality to keep its highways in a reasonably safe condition does not include the providing against insufficiency caused by extraordinary events.[93]

§ 17. Care in avoiding defects—Contributory negligence.

A person in charge of a vehicle must use ordinary care to avoid injury from any defect in the highway. Ordinary care is such care as prudent men ordinarily use in like circumstances, taking into consideration the time, place, condition of the highway, possible dangers, known obstructions, and the damage likely to result from driving carelessly at that particular time and place.[94] Therefore it has been held that when a highway is of reasonable width and smooth-

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91. Baker v. Fall River, (Mass.) 72 N. E. 336.

92. Moriarity v. Lewiston, 98 Me. 482, 57 Atl. 790. See Cunningham v. Clay Tp., 76 Pac. (Kan.) 907, holding that it is not a sufficient defense to show that the township officers have used ordinary care to prevent the defect on which the action is based.

93. Schrunk v. St. Joseph, (Wis. 1904) 97 N. W. 946.

94. Ford v. Whitman, (Del. Super. 1899) 45 Atl. 543.

ness a person who drives outside such a way assumes the risk.[95] In many states want of contributory negligence on the part of the owner or of the driver must be affirmatively shown.[96] Likewise it is the duty of a passenger when he has an opportunity to do so, as well as the driver, to learn of any danger in the highway and avoid it if possible.[97] mere knowledge of the defective condition of the road does not preclude recovery if the injured party used due care according to the danger which existed.[98] And although it be the duty of the driver to look where he is going, yet it cannot be laid down as an inflexible and unvaried rule of law that he must keep his eyes constantly fixed on the roadbed, and is affected with notice of every defect therein, great or small, which can be detected by doing so.[99] In considering the question of due care the jury may keep in mind the "Law of the Road" when it appeared the plaintiff went to the right side of the road to avoid some workmen, when the left side afforded a better way, and this although there was no other vehicle in the immediate vicinity.[100]

§ 18. Notice of defects—Notice of accident.

In many states no recovery can be had of a township or a municipality for injury from a defective highway, unless the township or municipality can be said to have had notice of the defect from which the injury resulted; and in some states the notice must be actual notice, not notice inferable

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95. Orr v. Oldtown, 99 Me. 190, 58 Atl. 984.

96. Orr v. Oldtown, 99 Me. 190, 58 Atl. 914.

97. Whitman v. Fisher, 98 Me. 575, 57 Atl. 895.

98. Gardner v. Wasco County, (Ore. 1900) 61 Pac. 834, rehearing denied, 62 Pac. 753.

99. Smith v. Jackson Tp., 26 Pa. Super. Ct. 234.

100. Baker v. Fall River, (Mass.) 72 N. E. 336.

from the notoriety or long continuance of the defect in question.[101] If the chairman of the selectmen and superintendent of streets has knowledge of the defect it is proper to find that the town was charged with notice.[102] In many states it is necessary to file a notice, within a specified time, of an accident from a defect in the highway with an officer of the town, township, or municipality in which the injury was received. The requirements of such notice vary with different jurisdictions, but they must in all cases be substantially complied with.[103]

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101. Hair v. Ohio Tp., (Kan. 1900) 62 Pac. 1010 [*construing* Gen. Sts. 1899, ch. 16, sec. 317].

102. Pratt v. Inhabitants of Cohasset, 177 Mass. 488, 59 N. E. 79.

103. Dean v. Sharon, 72 Conn. 667, 45 Atl. 963; Joy v. Inhabitants of York, 99 Me. 237, 58 Atl. 1059; Garske v. Ridgeville, (Wis.) 102 N. W. 22.

CHAPTER VII.

RIGHTS, DUTIES AND LIABILITIES OF AUTOMOBILE DRIVERS.

§ 1. General duties of drivers.

The driver of a vehicle is bound to use reasonable care and to anticipate the presence on the street of other persons having an equal right with himself to be there.—Geiselman v. Schmidt, 68 Atl. Rep. 202. The Supreme Court of the State of *Connecticut* in a decision just handed down makes

some observations regarding the duties of motorists that are of considerable importance to all who drive cars.

The opinion says:

"To persons riding along or crossing our public roads, and especially our city streets, the rapidly moving automobile is a source of constant danger. Their great weight and speed power and resulting momentum render the consequences of a collision with them much more serious than with ordinary carriages even moving at a higher rate of speed, and it is much more difficult to avoid, and much more confusing to attempt to avoid, the rapidly moving automobile than the street railway car, which has a fixed and known direction and course upon the tracks.

"While owners of automobiles have the right to drive them upon public streets, yet the proper protection of the equal rights of all to use the highways necessarily requires the adoption of different regulations for the different methods of such use; and what may be a safe rate of speed at which to ride a bicycle or drive a horse may be an unreasonably rapid rate at which to drive an automobile in the same place. For the reasons stated, and others which might be given, driving of an automobile at a high rate of speed through city streets at times when and places where other vehicles are constantly passing, and men, women and children are liable to be crossing; around corners at the intersection of streets, or in passing street cars from which passengers have just alighted, or may be about to alight; or in other similar places and situations where people are liable to fail to observe an approaching automobile, the driver is bound to take notice of the peculiar danger of collisions in such places. He cannot secure immunity from liability by merely sound-

ing his automobile horn. He must run his car only at such speed as will enable him to timely stop it to avoid collisions. If he fails to do so, he is responsible for the damage he thereby causes." See Irwin v. Judge, 71 Atl. Rep. 573.

§ 2. Reasonable care expected from all.

A traveler upon the public highway has a right to assume within reasonable limits that others using it will exercise reasonable care.—Indianapolis St. Ry. v. Hoffman, 82 S. E. Rep. 543.

§ 3. Due care in driving.

A driver of a vehicle in a street must exercise care to prevent reaching a point from which he is unable to extricate himself without colliding with another vehicle, and, omitting such duty, the greatest vigilance on his part when the danger arises will not avail him.—Altenkirck v. National Biscuit Company, 111 N. Y. S. 284.

§ 4. Care in avoiding injury.

In an action for injuries sustained by the plaintiff, owing to her horse having become frightened by the defendant's automobile when the defendant was attempting to pass the plaintiff on the road, it was incumbent on the plaintiff to show that she used ordinary care to avoid being injured.—Nadeau v. Sawyer, 59 At. Rep. 369; 73 N. H., 70.

§ 5. Reciprocal rights and duties.

A person with a horse and wagon, and a person with an automobile, each has a right to use the highways with his respective vehicle, but it is the duty of each to exercise his

right with due regard to the corresponding rights of the other.[1]

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1. Noise.—The noise incident to the operation of an automobile in a highway are not of themselves, evidence of negligence.—House v. Cramer, 112; N. W. Rep., 3.

There can be no recovery for injury resulting from ordinary noises, or from appearance of an automobile which was not being run at an excessive rate of speed.—Eichman v. Buchhiet, 128 Wis. 385.

Traveling on bridges.—It is the duty of one approaching a drawbridge to stop, look and listen. In an action against a county for the death of decedent through driving off an open drawbridge at night, the evidence was held to show that the deceased was guilty of contributory negligence.—Comm. v. State, 68 Atl. Rep. 602.

Care required of operators of automobiles.—The operation of an automobile upon the crowded streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warnings of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. The pedestrian also must use such care as an ordinary prudent man would use under like circumstances. Lampe v. Jacobson, 90 Pac. Rep. 655.

Damages.—Where the plaintiff's automobile, while standing in a proper place along the street, was struck and damaged by a ladder projecting from the defendant's wagon, because of the defendant's driver swerving his horse so as to bring the ladder in contact with the machine, the plaintiff was held to be entitled to recover.—Denny v. Strauss & Co., 109 N. Y. Supp., 26.

Estimated future profits cannot be recovered.—Jimeney v. San Juan Light & Transit Co., 3 Porto Rico Rep. 178.

Reasonable care.—One using the highway with an automobile must exercise reasonable care to prevent injury to others.—Fletcher v. Dixon, 68 Atl. Rep. 875.

One undertaking to pass another on a highway going in the same direction must take reasonable care so as not to injure him, and is liable for consequences resulting from negligence.—Simeone v. Lindsay, 65 At. Rep., 778.

While the owners of automobiles have, subject to statutory restrictions, equal rights with the owners of other automobiles to use the highways, this equality of rights imposes a reciprocal duty of managing the machine with care and caution to avoid causing injury to others having equal rights.

The owner of electric street cars in running them is governed by the same rules which apply to the management of other vehicles, and, being of greater size and weight than vehicles commonly are and capable of being moved at a very high speed, the car must at all times be kept so well in hand as not to expose others to unreasonable hazard. See Currie v. Consolidated Ry. Co., 71 Atl. 356; Laufer v. Bridgeport

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Liability for injuries.—A traveler on a highway, injured in a collision with the vehicle of another traveler, is entitled to recover for the injuries received, in case they resulted directly from the want of ordinary care on the part of the latter, and not from his own want of ordinary care, directly contributed.—Standard Oil Co. v. Hartman, 62 At., 805; 102 Md., 263.

Public automobiles.—The driver of a public vehicle is bound to be a skilful driver, and any damage arising from his unskilful driving is a ground of action. A less degree of skill is to be looked for from the driver of a private vehicle, but he is bound to drive with reasonable care and skill. Collier v. Chaplin, U. P., C. P., cor. Byles, J., Westminster, Feb. 1, 1865; Oliphant's Law of Horses, p. 283.

Reciprocal rights and duties.—Towle v. Morse, 68 Atl. Rep. 1044.

Electric street cars are governed by the same rules which apply to the management of other vehicles, and being of greater size and weight than they commonly are and capable of being moved at a very high speed, the car must at all times be kept so well in hand as not to expose others to unreasonable hazard. Currie v. Consolidated Ry. Co. 71 Atl. 356; Laufer v. Bridgeport Traction Co., 68 Conn. 475; 37 Atl. Rep. 379; 37 L. R. A. 533.

Negligence.—Lawson v. Wells Fargo & Co., 113 N. Y. S. 647, Arseneau v. Sweet, 119 N. W. Rep. 46, Wistrom v. Redlick Bros., 92 Pac. Rep. 1048; Geiselman v. Schmidt, 68 Atl. Rep. 202.

Ignorance.—Wistrom v. Redlick Bros, 92 Pac. Rep. 1048.

Traction Co., 68 Conn. 475; 37 Atl. Rep. 379; 37 L. R. A. 330.[2]

§ 6. Operation of traction engines.

The law imposes on the owner of a traction engine the duty to act with due regard for the rights and safety of persons travelling upon a public road in moving the engine over such road, and he is liable for injuries due to negligence on his part.[3]

§ 7. Driving in crowded streets.

In Lampe v. Jacobson, 90 Pac. Rep. 654, the Supreme Court of Washington says, through Judge Root: "The operation of an automobile upon the crowded streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movement of a street car or other ordinary heavy vehicles, it is necessary that caution should be continuously exercised to avoid collision with pedestrians unaware of its approach. The speed should be lessened, warning of approach given, and skill and care in its management so exercised as to anticipate such collision as the nature of the machine, and the locality might suggest as liable to occur in the absence of such precautions. The pedestrian must also use such care as an ordinarily prudent man would use under like circumstances." For speed in built up sections, see People v. Dow, 116 N. W. Rep. 745.

§ 8. Unavoidable accidents.

An accident to a traveler on a highway struck by an automobile, happening without negligence on the part of

2. **Avoiding injury.**—McIntyre v. Orner, 146 Ind. 17.

3. **Traction engines.**—Miller v. Addison, 10 Md. 192, 14 Am. Rep. 347.

the driver of the automobile or the traveler, is an unavoidable accident, and the traveler cannot recover therefor.[4]

§ 9. Negligence must be shown.

To enable a traveler on foot on a highway to recover for an injury sustained by being struck by an automobile, he must show by the weight of the evidence that the negligence which proximately caused the accident was the negligence of the defendant in the operation of the automobile.[5]

§ 10. Prima facie evidence of negligence.

Traveling on the wrong side of the street while a collision occurs constitutes *prima facie* evidence of negligence.—Angell v. Lewis, 20 R. I. 391. See also Perlstein v. Am. Exp. Co., 177 Mass. 530.

§ 11. Drivers must anticipate danger.

The driver of a vehicle is bound to use reasonable care and to *anticipate* the presence on the street of other persons

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4. **Accidents.**—Simeone v. Lindsay, 65 Atl. Rep. 778.

5. **Must show negligence.**—Simeone v. Lindsay, 65 Atl. Rep. 778; Seaman v. Mott, 110 N. Y. S. 1040.

Under the Illinois law, which provides that in an action to recover damages caused by running an automobile at a greater speed than 15 miles per hour a prima facie case shall be made by showing the injury and excessive speed, it was held, in an action for injuries to the plaintiff, whose horse was frightened by the defendant's automobile, that an instruction in the language of the statute as to the facts sufficient to make out a prima facie case in an action for injuries caused by excessive speed was not erroneous on the theory that it ignored the question as to whether the injuries were occasioned by running the automobile at an excessive speed. Ward v. Meredith, 77 N. E. Rep. 119, 220 Ill. 66.

Street car passenger hit.—Brewster v. Barker, 113 N. Y. S. 1026; N. Y. Transp. Co. v. Garside, 157 Fed. Rep. 521.

Pedestrian crossing street.—McCormick v. Hesser, 71 Atl. 55. See the chapter pertaining to pedestrians.

having an equal right with himself to be there.—Geiselman v. Schmidt, 68 At. Rep. 202.

§ 12. Vehicles left standing at night.

While driving at night, the plaintiff's vehicle ran into the defendant's carriage, standing in the dark directly across a street, without a light, signal or other indication of danger. It was held by the Supreme Court of Errors of Connecticut that the lower court properly refused to decide that the defendant's act in leaving his carriage in such a manner so as to obstruct more than half the highway was negligence as a matter of law.—Nesbit v. Crosby, 51 At. Rep., 550; 74 Conn., 554.

§ 13. Towing automobiles.

The power of an electric hansom belonging to the defendant having become weak, it was towed by another hansom of the defendant's with a rope about 6 or 7 feet in length. A driver was seated on a high seat in the rear of each machine. At a street crossing an officer in charge of the traffic signaled them to stop, which they did, and the plaintiff attempted to pass between the two hansoms. The rear driver, seeing her, called out a warning of the rope, which, she testified, she did not hear, and she was caught by the rope and thrown. Held, that the defendant was not negligent.—Canfield v. N. Y. Transp. Co., 112 N. Y., Supp. 854.

§ 14. Negligence.

Negligence of the defendant is properly found on evidence that, driving his automobile on the street, he came up behind the plaintiff, riding in the same direction on a bicycle, and ran into his wheel.—Heath v. Cook, 68 Atl. Rep. 427.

§ 15. Evidence of due care.

Where, in an action for injuries to a pedestrian struck by an automobile, there was evidence that he and his companions, while on the street, took precautions against injury, evidence that just before the accident one of the companions looked back, and stated that two street cars were coming, and that he looked back a second time, and said that if they hurried they could catch the second car, was admissible as bearing on the plaintiff's case, on the jury finding that the plaintiff was justified in relying on his companions. —Belleveau v. S. C. Low Supply Co., 86 N. E. Rep. 300.

§ 16. Skidding.

The mere fact that a motor omnibus damaged a street lamp because it skidded is sufficient to allow the case to go to the jury on the question of the driver's negligence.— Walton & Co. v. The Vanguard; Motorbus Co., T. L. Rep., Vol. XXV, No. 2, p. 13, Oct. 27, 1908.

§ 17. Thoughtless inattention.

The plaintiff and his sister were riding in an open wagon drawn by one horse, and, discovering the canopy top of an approaching automobile in which the defendant and a companion were traveling, the sister gave the statutory signal by raising the hand for the automobile to stop. The defendant disregarded the signal to stop and ran the automobile out of the highway two or three rods into a dooryard. The plaintiff was thereby induced to believe that he could drive along in safety, but the automobile unexpectedly turned and reappeared in the highway directly in front of the plaintiff, frightening his horse, and causing several personal injuries to the plaintiff. The verdict was for the plaintiff, who was awarded $225 damages.

If the defendant had regarded the plaintiff's signal and

promptly stopped his machine, the plaintiff would have had an opportunity to drive into the dooryard himself, as he intended to do. If the defendant had kept his car stationary for a few seconds in the dooryard, the plaintiff could have driven along the highway safely. The defendant did neither of these things; but, having induced the plaintiff to believe that the car would remain beyond the area of danger, he suddenly reappeared with it in front of the plaintiff, partly in the highway. His explanation of this management of his car was that the team was so far up the road that it had passed out of his view. This must be deemed thoughtless inattention on his part, and "thoughtless inattention" has been declared by the Supreme Judicial Court of Maine to be the "essence of negligence."

The court held that the defendant's thoughtless inattention under the circumstances was a failure of duty on his part toward the plaintiff, and the approximate cause of the injury, and that the verdict in favor was warranted by the evidence.—Towle v. Morse (Me., 1908), 68 Atl. Rep., 1044, citing Tasker v. Farmingdale, 8 Me., 523; 27 Atl. Rep. 464.

§ 18. Legal status of guest.

The legal status of one riding in an automobile as a guest of the driver or owner is somewhat uncertain at the present time, owing to the entire lack of judicial decisions covering cases involving the guest's rights and responsibilities.

That there is a liability both civil and criminal which might arise under certain circumstances must be conceded, but, ordinarily, a guest occupies a position very similar to a passenger in a train, in so far as his liability is concerned, with this exception, however: If there is any relation of agency, at the time of the commission of the injury, be-

tween the guest and the driver, for example, where the driver at the guest's request controls the vehicle in a certain way, then it may be said that by reason of the privity existing between the two parties there is a joint liability for a wrong committed.

In considering the rights of a guest we have a different situation presented, although he pays nothing for riding, he is, nevertheless, in the care and custody of the owner or driver of the machine and is entitled to a reasonable degree of care for his safety. If the driver has negligently run into some obstacle on the highway and thereby injured the guest, undoubtedly the owner and the driver would be liable to civil suit for damages. One who voluntarily accepts an invitation to ride as a guest in an automobile does not relinquish his right of protection from personal injury caused by carelessness, and it should be understood by owners of motor vehicles that they assume quite a serious responsibility when they invite others to ride with them, especially persons who by reason of weaknesses are subject to injury from slight causes.

The criminal liability of a guest riding in an auto is quite different from his civil responsibility. If a motor vehicle violates the law concerning speed while a guest is in it, he may be said to be a user of the machine, although he is not actually driving. Most of the State automobile acts in this country provide that no motor vehicle or automobile shall be driven beyond a certain rate of speed at certain places. This prohibition means, not only that the person who has his hands upon the wheel shall not drive beyond the speed limit, but no one shall, who has it in his power to prevent it, allow the machine to be driven faster than the maximum rate.

A glaring instance of the statutory criminal liability of a

guest is conspicuous in the *Pennsylvania* act, which provides in Section 5 that

> "No person or persons shall be allowed to *use,* operate or drive any motor vehicle * * * at a greater speed than a mile in six minutes, etc."

It will be seen that persons are prohibited from using automobiles which are being driven at a higher rate than the law prescribes, and in Section 6 of the same act it is provided that,

> "Any person *using* or operating a motor vehicle * * * shall have displayed in a conspicuous place on the front and back of said vehicle tags furnished by the State Highway Department, etc."

These two sections of the Pennsylvania act apply to guests, and it is provided in Section 10 that if any person violates any of the provisions of the law he shall be subjected to a penalty, etc.

There is another aspect of the guest's criminal liability aside from what has been mentioned, and that is he might be considered, under certain circumstances, as a principal violator of the law even though he did not actually drive the machine at the time, if the machine was under his control and guidance while he acted in the capacity of director of its movements.

These questions are bound to be brought up sooner or later in the courts and interesting decisions may be expected.[6]

§ 19. Imputed negligence.

Where the plaintiff, a girl not over sixteen years of age, was sitting in the rear of a vehicle which her stepfather was driving, his negligence in driving into a dangerous

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6. See chapter XIV.

position could not be imputed to the plaintiff, her status being that of a mere passenger. Zalotuchin v. Metropolitan St. Ry. Co., 106 S. W. Rep. 548.

Where a street car is negligently run into a vehicle, one riding in the vehicle and injured thereby without negligence on his part, may recover for the injuries, although the driver of the vehicle was negligent. Eckels v. Muttschall, 82 N. E. Rep. 872.

Where the plaintiff and his companion were engaged in hauling fodder with a team, and the plaintiff was injured while his companion was endeavoring to force the horses past an object causing them fright, the relation of master and servant, or joint undertakes, existed between the plaintiff and his companion, so that the plaintiff was chargeable with the negligence of the latter.—Louisville & N. R. Co. v. Armstrong, 105 S. W. Rep. 473.

In an action against a street railway for injuries to the plaintiff received in a collision between the defendant's car and an automobile, in which the plaintiff was riding as a pasenger, having nothing to do with the control of the machine, it was held that he was not chargeable with the negligence of the driver of the automobile.—Ward v. Brooklyn Heights Car Company, 104 N. Y. Supp., 95.

In Chadbourne v. Springfield Street Railway, in the Supreme Judicial Court of Massachusetts (October, 1908, 85 N. E. 737), it was held that where plaintiff, who was inexperienced in the operation of an automobile, was injured, while riding as the guest of an experienced driver, in a collision between the automobile and a street car, the driver's negligence, if any, was not imputable to her. On this point the court said:

> "The question of the plaintiff's due care was for the jury. She seems to have conducted herself as an invited guest of the driver of an automobile or other

vehicle naturally would do. She trusted him as to the running of the machine; that is, she did not attempt to interfere with his management of the automobile. In view of her inexperience, and of what might have been found to be the skill and experience of the driver, the jury might well have thought that this was a wise course on her part. Nor was there any relation of agency between her and the driver, such as of itself would affect her with negligence on his part. She had no right to control him. There was no mutuality in a common enterprise between them. It cannot be said as matter of law that she ought to have warned the driver against turning out from behind the car which he had been following, especially in view of the fact that he was turning both in the direction required by statute (Rev. Laws, C. 54, Sec. 2) and in the only direction in which the width of the bridge afforded room for him to pass that car. And she had a right to rely somewhat on the acquaintance with the road which she might presume that he had.

Accordingly, we need not consider whether it can be said that Reed's conduct was, as matter of law, negligent. Even if this were so, the plaintiff's own due care was for the jury. (Schultz v. Old Colony St. Ry., 193 Mass., 309, 79 N. E., 873, 8 L. R. A., N. S. 597, 118 Am. St. Rep., 502; Miller v. Boston & Northern Street Ry., 197 Mass., 535, 83 N. E., 990.")

CHAPTER VIII.

MEETING AND PASSING.

(See also Chapter VI.)

§ 1. Turning to the right.

Where vehicles are approaching on the highway, the law requires them to seasonably turn to the right of the middle of the traveled part of the road, so that they can pass each other without interference.[1]

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1. Seasonably turn to the right.—The rule of the road requiring vehicles approaching to seasonably turn to the right, means turn to the right in such season that neither shall be retarded by reason of the other occupying his half of the way. Neal v. Rendall, 56 At. Rep. 209; 98 Me., 69; 63 L. R. A. 668.

"Persons in their place of security and power in motor-cars should remember that their rapid and close approach may make a person think that he or she is about to be run over, when that may not be the case. They should turn out seasonably." The plaintiff in the action was driving behind a large truck on the right side of the road, and, as she turned to the left to go close along side of it and pass it, she testified that she saw the defendant about 300 feet away coming toward her on the same side of the road. When the automobile came almost up to the heads of the horses on the truck, the plaintiff turned to the left in alarm. At the same time, the defendant turned to the right and ran into the plaintiff's wagon. A verdict was given for the plaintiff, and the defendant appealed on

§ 2. Failure to seasonably turn to right.

Failure to seasonably turn to the right in meeting a vehicle on the highway is not negligence *per se*.—Neal v. Rendall, 56 At. Rep., 209; 98 Me., 69; 63 L. R. A., 668.

It constitutes a question of negligence for the jury.—Needy v. Littlejohn, 115 N. W., 482; McFern v. Gardner, 121 Ill. App. 1, 97 S. W. Rep. 972.

§ 3. Traveling on unfrequented part of highway.

Though, as between the public and the traveler, the latter, if he leave a portion of the road laid out and prepared for the customary use and travel, and go upon the unprepared and customary unused part, he does so at his own risk; yet he is entitled to the unobstructed use of the entire width of the highway as against the unlawful acts of other persons.[2]

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the ground that the court instructed the jury that it was the duty of the defendant to turn to the right "upon seeing an approaching vehicle." It was held that, while the rule did not require the defendant to turn out as soon as an approaching vehicle is seen, the instruction to that effect had not prejudiced the rights of the defendant in any way and the judgment was affirmed. Peters v. Cuneo, 108 N. Y. Supp. 264; Cedar Rapids Auto Co. v. Jeffery & Co., 116 N. W. Rep. 1054, Wistrom v. Redlick Bros., 92 Pac. Rep. 1048.

The New Jersey road act, 91 (Gen. St., p. 2823,) expressly requires that drivers of vehicles approaching one another from opposite directions shall each keep to the right when passing. Unwin v. State, 64 Atl. Rep. 163 *affirmed;* State v. Unwin, 68 Atl. Rep. 110.

2. Traveling on unfrequented part of highway.—Williams v. San Francisco & N. W. R'way Co., 93 Pac. Rep., 122.

Traveling on wrong side of road.—A traveler who for any reason is on the wrong side of the road must exercise greater care to prevent a collision. N. Y. Transp. Co. v. Garside, 85 C. C. 285; Pluckwell v. Wilson, 5 Carrington & Payne (Eng.) 375; Fahrney v. O'Donnell, 107 Ill. App. 608; Angell v. Lewis, 20 R. I. 391.

Injured party on wrong side of road.—Under the *Rhode Island* General Laws, 1896, Chapter 74, 51, providing that a person traveling

§ 4. When half of road need not be given.

While the law requires a person on a public highway in any vehicle to turn to the right and give one-half of the traveled road upon meeting another vehicle, yet the fact that one does not give the other half of the road is not conclusive evidence of negligence, and in an action to recover for injuries alleged to have been caused by the defendant's failure to give the plaintiff's buggy half of the road, if the plaintiff's horse and buggy were outside the traveled road, the defendant need not give one-half of the road, but could run his automobile on the traveled path, provided there was room to pass and the plaintiff's horse had shown no signs of fright.—Needy v. Littlejohn, 115 N. W., 483.

§ 5. Presumption in case of collision.

If a collision takes place the presumption is against the person on the wrong side of the road.—Angell v. Lewis,

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with a vehicle on a highway shall seasonably turn to the right of the centre of the traveled road on meeting any other person so traveling, a person injured by collision with a vehicle while riding a bicycle on the left side of the road must show a sufficient excuse for being there, to attribute negligence to the driver of the vehicle. Puick v. Thurston, 54 At. Rep., 600; 25 R. I., 36.

Liability for turning out.—Under the provision of the Iowa statute, requiring a person in a vehicle to give to another vehicle one-half of the road on meeting, liability on failing to do so arises only when such failure is the proportionate cause of resulting injury. Needy v. Littlejohn, 115 N. W., 483.

Questions for jury.—In McFern v. Gardner, 97 S. W. Rep. 972, the St. Louis Court of Appeals of Missouri holds that the question of the negligence of the chauffeur in turning the automobile to the left instead of to the right as required by law, in failing to discover another vehicle and in driving the machine at a dangerous rate of speed, are for the jury to determine. It is also held in this case that it is the duty of a chauffeur driving an automobile on the public highway in a populous place to keep a vigilant watch ahead for vehicles and pedestrians, and at the first appearance of danger to take proper steps to avert it.

20 R. I., 391; In Perlstein v. Am. Exp. Co., 177 Mass. 530, it was held that evidence that the plaintiff was driving on the right hand side of the street close to the sidewalk *is evidence of due care on his part,* and that the defendant was driving " very fast " in the opposite direction and collided with the plaintiff was evidence of negligence on the part of the defendant.

§ 6. Treble damages under statute.

The plaintiff, in order to get treble damages under the General Statutes of *Connecticut,* Sections 2689, 2690, providing that drivers of any vehicles " for the conveyance of persons " meeting each other in a highway shall turn to the right and slacken speed, and any driver of such vehicle who shall, by failure to do so, drive against another vehicle, shall pay to the party injured treble damages, must show by the complaint, as well as evidence, that the defendant was driving such a vehicle; and a mere description of the vehicle as a wagon or team is insufficient.—Rowell v. Crothers, 52 At. 818; 75 Conn. 124.

For additional matter concerning this subject, see Chapter VI.

CHAPTER IX.

OVERTAKING AND PASSING—TURNING CORNERS.

(See also Chapter VI.)

§ 1. Overtaking and passing.

The rule that one who attempts to pass another on the highway going in the same direction has the right to do so in such manner as may be most convenient under the circumstances, and where damage results to the person passed the former must answer for it, unless the latter by his own carelessness brought the disaster on himself, is applicable to one attempting to pass a standing vehicle which he approaches from the rear. Altenkirck v. National Biscuit Company, 111 N. Y. S. 284.

An automobilist, on overtaking and attempting to pass two heavily loaded trucks on a road, drove his automobile between the rear truck and a passing carriage, cleared the rear truck, and struck the head one, resulting in injury to himself and his automobile. The drivers of the trucks had stopped their horses to rest them, and the head truck was nearer the centre of the road than the other. Because it was dark and the road curved sharply and was on a grade, the automobilist's lights did not disclose the trucks until he was upon them. Held that the accident was caused by the

automobilist's own negligence. Lorenz v. Tisdale, 111 N. Y., Supp. 175.

In an action for damages due to the defendant's automobile colliding with the plaintiff's carriage, going in the same direction, the question whether the defendant was negligent in attempting to pass the plaintiff on the left, as the law provides, near a corner which they were approaching, when he knew that if the plaintiff should turn the corner a collision would occur, and that a delay of a few moments would show whether the plaintiff was to turn or not, was one for the jury. See Mendelson v. Van Rensselaer, 103 N. Y. Supp. 578.

For additional matter concerning this subject, see Chapter VI.

§ 2. Applicability of statutes.

The *Massachusetts* law which provides that the driver of a carriage or other vehicle passing a carriage or other vehicle traveling in the same direction shall drive to the left of the middle of the traveled part of the way, applies to the driver of a team passing from behind an electric street car which has stopped to let off passengers. The fact that in passing from behind an electric street car which has stopped to let off passengers, the driver of the vehicle goes to the right of the car, instead of to the left as required by statute, is evidence of negligence on his part.[1]

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1. **Massachusetts statute.**—McGourty v. De Marco, 200 Mass. 57.

The New Jersey road act.—Section 91 (Gen. St., p. 2823), expressly requires that, when the vehicles are moving in the same direction, and the driver of the one in the rear desires to pass the one in front of him, he shall pass it on his left, the driver of the vehicle in front keeping over to the right while being passed. Unwin v. State, 64 Atl. Rep. 163, *affirmed;* State v. Unwin, 68 Atl. Rep. 110.

§ 3. Statute may be read to jury.

The Public Statutes of New Hampshire, Ch. 76, Sec. 16, declare that if a person traveling on a highway is informed that another person traveling in the same direction desires to pass him, he shall turn to the right, if there is sufficient room to enable him to do so. In Nadeau v. Sawyer, 59 At. Rep. 369; 73 N. H., 70, it was held that in an action for injuries sustained by the plaintiff, owing to her horse having been frightened by the defendant's automobile, when the defendant was attempting to pass the plaintiff going in the same direction, and having given warning, it was not error for the court to read the statute to the jury, as it was evidence relative to the issue.

§ 4. Turning corners.

Where the defendant's automobile collided with the plaintiff's carriage in attempting to pass when the plaintiff was turning a corner, the question whether the plaintiff's attempt to turn the corner by keeping to the left in the usual beaten path when the law required keeping to the right constituted contributory negligence was a matter for the jury. Under the conditions the question whether the defendant gave a sufficient warning, or whether he properly managed his automobile in attempting to pass the plaintiff at the point was also a question of fact for the jury. See Mendelson v. Van Renselaer, 103 N. Y. Supp. 578.

§ 5. Approaching at right angle crossings.

Where two persons are approaching each other at right angles, the rights of each are equal, and each is bound to exercise reasonable care to avoid injury to the other. Gilbert v. Burque, 57 At. Rep. 927; 72 N. H. 521.

CHAPTER X.

FRIGHTENING HORSES.

(See also Chapter VI.)

§ 1. In general.

"Automobiles are constantly driven along streets past horses without frightening them, and if the appearance and movement of a particular automobile and the noise incident to its operation are in no way unusual, it is not *per se* a wrongful act to operate it in proximity to a horse, so long as the horse exhibits no fright." Per the St. Louis Court of Appeals in O'Donnell v. O'Neil, 109 S. W. Rep. 815.[1]

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1. Evidence.—Where the plaintiff was injured by his horse becoming frightened at a passing automobile, evidence as to the condition of the highway 300 feet east from where the defendant's witness saw the automobile and east of where the accident occurred was held inadmissible as being too remote. Strand v. Grinnell Automobile Garage Co., 113 Northwestern Reporter, 488.

In an action for injuries to the plaintiff by his horse becoming frightened at the defendant's automobile, evidence of the plaintiff's negligence was held to be a question for the jury to determine. Strand v. Grinnell Automobile Garage Co., 113 N. W. Rep. 488.

The plaintiff was the only witness as to the speed of the defendant's automobile and as to a signal to stop. He was contradicted

Where in an action for damages occasioned by the frightening of plaintiff's team by the operation of defendant's automobile, it appeared that the team pulled back and escaped immediately on the stopping of the automobile, and it did not appear that, had the defendant arrested the sparker as soon as he saw or might have seen that the team was frightened, it would have been in time to have obviated their escape, or that he could have done anything to have stopped their fright after he might have discovered it, he was not guilty of negligence warranting a recovery. House v. Cramer, 112; N. W. Rep. 3.

Where the plaintiff's horse became frightened at bags of cement located near a culvert, from which the planking had been removed, and the plaintiff, without knowledge of such open culvert, endeavored to urge the horse past the cement, and in doing so momentarily lost control of the horse, so that the buggy was driven into the open culvert and overturned, there being no barriers or warning signs

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on both points by four or five witnesses. There was no evidence that the machine made an unusual noise or emitted steam or smoke which might cause fright. The jury found for the plaintiff. The plaintiff claimed that the defendant did not have his horse under control, and that the animal shied at the sight of the automobile, causing the carriage to slip down a depression in the road. The court held that a new trial should be granted. Silberman v. Huyette, 22 Montg. Co. L. Rep. 39.

In an action for injuries caused by the frightening of a horse by an automobile, the evidence was held to present a question for the jury whether the defendant was guilty of gross negligence in the operation of the automobile. Weiskopf v. Ritter, 97 S. W. Rep. 1120, 29 Ky. Law Rep. 1268.

In an action for injuries to the plaintiff's wife resulting from the plaintiff's mule becoming frightened at the defendant's automobile, which was stopped, with the engine running, near a bridge to permit the plaintiff to pass, it was held that the evidence required the submission of the question of negligence of the defendant's chauffeur to the jury. Rochester v. Bull, 58 S. E. Rep. 766.

to prevent travelers using the road across the culvert, it was held that the plaintiff was not negligent as a matter of law. Judd v. Caledonia Turnpike, 114 N. W. Rep. 346.

Where the plaintiff alleged that the defendant drove its automobile on a street at a high rate of speed, and negligently ran it against the plaintiff's horses, frightening and injuring them, and causing them to run away, evidence that the automobile approached slowly, but that the driver failed to stop it, or slacken its speed when seeing that the horses were frightened and about to run, was proof of facts not legally identical with those alleged, and the plaintiff could not recover.[2]

§ 2. Notice that horses take fright.

The operator of an automobile propelled by a gasoline engine is charged with notice of the fact that horses may be frightened thereby, and is bound to handle his machine in such a manner as to avoid frightening horses lawfully on the highway.[3]

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2. Trout Brook Ice Co. v. Hartford Electric Light Co., 59 Atl. Rep. 405, 77 Conn. 338.

Verdict sustained.—In Strand v. Grinnell Automobile Garage Co., 113 N. W. Rep. 488, a verdict was sustained which held an automobilist to have been negligent in frightening a horse.

3. Notice.—House v. Cramer, 112 N. W. Rep. 3.

It is incumbent upon a person driving an automobile along a highway to take notice that motor cars are, as yet, usually strange objects to horses, and are likely to startle the animals when driven up in front of them at a rapid rate. McIntyre v. Orner, 166 Ind. 57.

Excuse for failure to observe frightened horses.—It is no justification for the failure of the driver of an automobile to look ahead and observe the fright of horses drawing an approaching carriage that it is necessary for him to keep his eyes and attention fixed on the track of the road to enable him to guide the machine by the carriage safely and to avoid chuck holes and other obstacles. McIntyre v. Orner, 166 Ind. 57.

"*Just when a horse is about to become frightened* and just when he is actually frightened is very difficult to determine, and we think the plain meaning of the statute is to require persons using such vehicles as automobiles, calculated to frighten horses, to stop the same whenever a horse shows indication of fright upon their approach." Per Illinois Supreme Court in Ward v. Meredith, 77 N. E. Rep. 118, 220 Ill. 66.[4]

§ 3. When driver may pass a horse.

Under laws of *Wisconsin,* 1905, p. 469, c. 305, Sec. 4, requiring that the operator of an automobile on a signal of distress by a person driving horses shall cause the automobile to stop all motor power and remain stationary, unless a movement forward shall be deemed necessary to avoid accident or injury, it is for the operator to determine whether a forward movement is necessary, and his determination in controlling unless he acts unreasonably or in bad faith. Cummins v. State, 112 N. W. Rep. 25; also deciding sufficiency of criminal pleading.

§ 4. Runaway horses.

No inference of negligence arises from the fact that a gentle horse was left untied in the public street, free from the presence of anything which might disturb him, the driver being within a few feet of the wagon to which the horse was hitched, and it appearing that the driver had been accustomed to use the horse in that way for many years without an accident. Belles v. Kellner, 51 At. Rep. 700; 67 N. J. Law, 255; 57 L. R. A. 627.

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4. The obligation imposed by the Illinois Stat. 1903, as to the stopping of an automobile when a horse is about to be frightened, applies as well to cases where the horse has actually become frightened. Ward v. Meredith, 122 Ill. App. 159; *judgment affirmed* 77 N. E. Rep. 118, 220 Ill. 66.

§ 5. Noise.

A motorist, in compliance with a signal from the driver of a mule, ran his machine into a cut-out in the bank on the side of the road, and the forward motion of the machine stopped. The motor, however, was permitted to continue running, and, according to the testimony given in an action by the party driving the mule, gave forth considerable noise and caused the whole machine to vibrate. The plaintiff continued his approach; the mule becoming more or less frightened as he neared the machine. When he was almost opposite it, he became uncontrollable, and ran over to the extreme right of the road, where he struck a telephone pole, throwing the plaintiff from the wagon. The question of the negligence of the defendant was permitted to go to the jury and the jury found negligence and awarded damages to the plaintiff. It is a fact of which courts will take judicial notice that automobiles on highways, especially when they are infrequent, have a tendency to frighten animals. The duty, therefore, devolves upon the drivers of such machines to exercise due care to prevent accidents. The amount of necessary care varies with the various circumstances, and acts, which in a given case might be negligence in another might be due care. Therefore it is almost absolutely necessary that what action amounts to due care must be a question of fact. From the evidence, it was held that the present case was one in which great care was required. Rochester v. Bull 58 S. E. Rep. 766. See also Sapp v. Hunter, 115 S. W. Rep. 463; Fletcher v. Dixon, 68 Atl. Rep. 875.

§ 6. Contributory negligence.

One who leaves a horse unhitched on a city street takes the risk of what the horse may do. It was held in Henry v. Klopfer, 147 Pa. 178, that such an act raises a presump-

tion of negligence, and puts on the party doing it the burden of showing circumstances which justified or excused it. How strong the presumption will be must depend largely on the circumstances. If the horse is young, skittish, nervous or unused to the sights and sounds of a city street, the presumption would be strong, while, if he is old, staid and accustomed to city life, it might be very slight. But even a staid and veteran horse may be liable to sudden fright. It is a matter for the jury. Stevenson v. U. S. Express Company, Pa. Leg. Intel., July 3, 1908, Sup. Ct.

In Kokoll v. Brohm & Buhl Lumber Co., 71 Atl. Rep. 120, the Supreme Court of New Jersey holds that the unexplained presence on a public highway of a team of runaway horses, harnessed to a wagon, unattended by the owner or other person, raises a presumption of negligent management on the part of the owner; and if they collide with another vehicle on the street because they were not under proper control, the owner will be liable for damages resulting therefrom.[5]

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5. **Failure to jump.**—In an action to recover damages for personal injuries sustained by the plaintiff in consequence of the frightening of his horses by the defendant's automobile, an allegation in the declaration that at an earlier hour on the same day of the accident the defendant's automobile had passed the plaintiff's carriage and greatly frightened his horses, does not justify the court in presuming that it was contributory negligence for the plaintiff to fail to jump out of his carriage upon the second approach of the automobile. McIntyre v. Orner, 166 Ind. 57.

Injury by horse.—One may recover for injury caused by a runaway horse which has been left unhitched, without proof that it had a habit of running away, known to its owner, if it was left in the street unhitched under circumstances which made it negligence to do so. Haywood v. Hamm, 58 At. Rep., 695; 77 Conn., 158.

A person in charge of a horse on a public highway is bound to take care that it will do no injury in consequence of being frightened, and if he leaves it, must see that it is securely fastened. City of Denver v. Utzler, 88 Pac. Rep. 143.

§ 7. When horses are beyond control.

Horses are not to be considered beyond control of their driver where they merely shy or start and for a moment have their own way. Johnson v. City of Marquette, 117 N. W.658.

§ 8. Breakdown on highway.

Where a power propelled vehicle, liable to frighten horses, breaks down on a public highway, and is left at the place of the breakdown, the owner of the vehicle is not liable because a horse becomes frightened at the vehicle, unless there was unreasonable delay in repairing and removing it. Davis & Son v. Thornburg, 62 S. E. Rep. 1088.

CHAPTER XI.

DUTY TO STOP AUTOMOBILE.

(See also Chapter VI.)

§ 1. Duty to stop.

When it becomes evident to the driver of an automobile that his machine is frightening the horses hitched to an approaching carriage and that his further progress will increase the peril of the persons in the carriage, it is his duty to stop, or at least slack up, irrespective of whether the occupants of the carriage are guilty of negligence.

When the driver of an automobile on a highway sees, or by the exercise of reasonable caution could see, that the horses drawing an approaching carriage are unmistakably frightened and are forcibly crowding off of the road, ordinary care requires him to slow up, stop his machine, or do whatever is reasonably required to relieve the persons in the carriage from their perilous situation.[1]

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1. Duty to stop.—McIntyre v. Orner, 166 Ind. 57.

Stopping machine near horses.—Where the operator of an automobile stopped it in the street near a blacksmith shop, and anticipated starting again shortly, he was not negligent in allowing the explosions from his gasoline engine to continue unless he saw that they were frightening the plaintiff's team, or in the exercise of ordinary care ought to have noticed it, and by ordinary diligence might have stopped the explosion in time to have avoided the runaway. House v. Cramer, 112 N. W. Rep., 3.

§ 2. When engine must be stopped.

In House v. Cramer, 112 N. W. Rep. 3, it was held that the operator of an automobile was not bound to stop his engine on temporarily stopping the automobile, unless he saw that the explosions were frightening the plaintiff's team, or, in the exercise of ordinary care, might have stopped such explosions in time to have prevented the team from running.

§ 3. Stopping on signal.

The General Laws of *Minnesota*, page 646, Chap. 356 (Sec. 1277, Rev. Laws 1905), providing that the driver of an automobile on any public road, when signaled by the driver of any team, shall stop until the other vehicle has passed, do not require the driver of the automobile to stop the motive power of his vehicle in addition to stopping the vehicle itself; and whether the defendant's failure to stop the motive power is negligence must be decided by the circumstances of each case. Mahoney v. Maxfield, 113 N. W. Rep. 904.

Under the *Indiana* automobile law it is held that an automobile driver must stop upon signal from any one in a horse-drawn carriage, the word "driving" not being limited to the mere physical act of managing or directing the horse.[2]

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2. Motorist must stop on signal from any occupant of carriage under Indiana statute.—A prosecution was lodged against an Indiana motorist for refusing to bring his car to a stop, upon being signaled to do so, in compliance with the statutes of that State which provide a penalty for the driver of an automobile who fails to stop upon request by signal from any person "riding, leading or driving a horse." In this case the signal, which was ignored by the motorist, came from a carriage containing two persons and was given by the occupant who was not driving, the driver being engrossed in his efforts to restrain the frightened horse. The

§ 4. Signal unnecessary.

The fact that the plaintiff, when approaching an automobile with a restive horse, did not signal the chauffeur to stop, did not relieve the latter from his duty to exercise ordinary care to avoid an accident and to stop the automobile until the plaintiff's horse could pass, if such precaution appeared to be reasonably necessary.[3]

§ 5. Construction of statute.

A *Wisconsin* statute provides that every person driving an automobile, on a signal of distress from a person driving horses, shall cause the automobile to stop all motor power and remain stationary, until the horses appear to be under control, "unless a movement forward shall be deemed necessary to avoid accident or injury." In a prosecution

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motorist sought to escape liability on the ground that the signal did not come from the person "driving" the horse, as required by the statute, but was given by someone in the carriage who was not actually engaged in driving. In other words, he asked the court to construe the statute to mean that it was not his duty to stop unless signalled to do so by the person handling the reins. As is usual in a case where a precise definition of a word is required, recourse was had to the dictionaries, where driving is found to mean "to ride in a vehicle drawn by horses, or other animals, or to direct or control the animals that draw it." While criminal statutes, as a rule, are to be strictly construed, courts refuse, on one hand, to hold persons not clearly brought within the scope of the statute and, on the other hand, to discharge those not clearly within its scope. It was held that, to attach to the statute the construction claimed by the defense would be unreasonable, if not absurd, and that the signal to stop, in order to be legally effective need not be given by the person holding the lines, but may be given by any occupant of the vehicle. State v. Goodwin, 82 N. E. Rep. 459.

3. Necessity for signal.—The driver of a restive horse, on approaching an automobile is not required under all circumstances to give a signal to a chauffeur or driver to stop in order to free himself from contributory negligence. Strand v. Grinnell Automobile Garage Co., 113 N. W. Rep. 488.

under this statute it was held that the word "deemed," as used in the act, conveys the idea that the standard, upon which the operator is to act in determining whether a forward movement is necessary, rests in his own judgment. He must, of course, in all cases act reasonably and in good faith. In this particular prosecution it appeared that the defendant did not bring his car to a full stop upon being given the distress signal, and he was sentenced to pay a fine of $25 in addition to $9,526, the costs of the prosecution. McCummins v. State, 112 N. W. Rep. 25.[4]

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4. Indictment for failure to stop.—State v. Goodwin, 82 N. E. Rep. 459.

CHAPTER XII.

PEDESTRIANS AND MISCELLANEOUS.

(See also Chapter VI.)

§ 1. Pedestrian's rights.

Ordinarily a pedestrian has no right of way superior to that of the driver of an automobile, but each may continue in his own course with relative regard for the other's right of travel, and the driver of a motor car is not bound to bring his car to a stop, in the absence of proof authorizing an inference that, in the exercise of due care, he had reason to believe that if he proceeded a pedestrian would come in contact with the car, and where it did not appear that, after such contact was inevitable, the driver of the motor omitted anything to prevent that contact there was no liability.[1]

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1. Rights of pedestrians.—Seaman v. Mott, 110 N. Y. Supp. 1040.

In Gregory v. Slaughter, 99 S. W. Rep. 247, which holds an automobilist liable in damages for colliding with a pedestrian on a highway, the court says in his opinion:

"The appellant complains in his brief that he is the victim of public prejudice against automobiles. This may be true, and,

§ 2. Pedestrians crossing streets.

Where one injured by being run over by an automobile in the streets of a city saw it before it struck her, or by

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if so, that prejudice is based upon the carelessness of a large number of automobilists of a character similar to that of which this record shows appellant was guilty. The owners of automobiles have the same right on the public highways as the owners of other vehicles; but when one drives so dangerous a machine through the public thoroughfares it is incumbent upon him to exercise corresponding care that the safety of the traveling public is not endangered thereby. When owners of automobiles learn this it is confidently believed that whatever prejudice may now exist against them in the public mind will entirely disappear, for the public is not usually prejudiced without cause."

A pedestrian struck by an automobile is not guilty of contributory negligence because he was standing in the roadway, conversing with one who had there stopped his team to talk with him. Kathmeyer v. Mehl, 60 Atl. Rep. 40. The court in this case says: "Certainly he had no reason to suppose that, merely because he was standing in the roadway, he would be run down by the recklessness of the driver of an automobile. He was lawfully there, and any person using the highway was bound to take notice of him, and to use care not to injure him, and the plaintiff had a right to assume that this would be done."

The defendant approached on the left side of the street on account of the right side being blocked. The plaintiff had just stepped from a street care and was making for the sidewalk when she noticed an automobile coming on the right side of the street, and, of course, from the opposite direction from that of the defendant's car. In stepping back out of the way of the other automobile, the plaintiff got in the path of and was struck by the defendant's machine. An ordinance, as well as general custom, requiring automobiles to keep to the right side of the road, and the defendant being on the left, it was held that the defendant was bound to exercise greater care and caution to avoid injuring pedestrians and was held liable in damages. It was also held proper to instruct the jury that, if the driver of the defendant's machine saw, or should have seen, that another automobile was approaching from the opposite direction, and that between the two the plaintiff would be placed in a dangerous position, it was his duty to stop until the danger was past, and that a failure to stop the machine rendered the defendant liable. New York Transportation Company v. Garside, 157 Fed. Rep. 521.

reasonable use of her senses could have seen it in time to avoid the injury, she could not recover.[2]

A pedestrian and the driver of an automobile must each be careful in the exercise of his rights upon the streets, and the owner or driver of the automobile must exercise the greatest care and vigilance not to injure the pedestrian, and the pedestrian is bound to not place himself where an injury will probably result. Brewster v. Barker, 113 N. Y. S. 1026.

Running over person's foot.—A person who seeing another seated on a park bench, drives a vehicle so near him as to pass over his foot, is negligent. Silvermann v. City of New York, 114 N. Y. S. 59.

Question of negligence for jury —The case is for the jury to decide where the plaintiff was standing on the edge of a pavement with one foot on the curb and the driver of an automobile, either through reckless management or through inexperience, drove the machine on the curb and injured him. May v. Allison, 30 Super. 50.

2. Pedestrians crossing streets must look.—Where one injured by being run over by an automobile in the streets of a city saw it before it struck her, or by reasonable use of her senses could have seen it in time to avoid the injury, she could not recover. Hannigan v. Wright, 63 At. Rep., 234.

Contributory negligence of pedestrian.—Where a person crossing a street hears a horn when he is within ten feet of the curb and sees an automobile coming 130 feet away, and does not look towards the auto and walks into the street where he knows the machine will pass, he is guilty of contributory negligence and cannot recover. McCormich v. Hesser, N. J., 71 Atl. 55.

The question of negligence was one for the jury where a pedestrian was struck by an automobile as she was about to board a street car. She was not entitled to take a position even three or four feet from the car tracks and remain oblivious to the surroundings, but she was not guilty of contributory negligence because she did not look and did not see or hear the approaching machine. Arseneau v. Sweet, Minn. 119 N. Y. 46.

In an action by a boy 12 years old, injured by the defendant's automobile while he was playing in the roadway, it was held that the question of contributory negligence was for the jury. Turner v. Hall, 64 At. Rep. 1060.

Stepping in front of automobile.—There is no rule of law that requires an automobile to slow up as it passes a moving trolley car in the country. The duty is different where the trolley car is

§ 3. Rights of street laborers.

The rights of a laborer whose duties require him to be in that part of the street devoted to the use of vehicles, with respect to such vehicles, cannot be determined by the same rules applicable to pedestrians with no occupation requiring their presence in that part of the street.[3]

§ 4. Reasonable speed.

Reasonable safe rate of speed is a question for the jury.[4]

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standing to receive and discharge passengers. Nor is the automobile driver called upon to assume that a passenger will leap from a trolley car while it is in motion, and step in the path of an automobile in his immediate presence. Where a passenger steps or jumps from a moving trolley car, even if the car has little speed, and the momentum of the car carries him forward, so that he cannot look back and see an approaching automobile, he is negligent, if he steps in front of the automobile in full view, the moment he attempts to cross the highway. Starr v. Schenck, 25 Mont. L. Rep. (Pa.) 18.

Injured person attempting to avoid automobile.—In Scofield v. Town of Poughkeepsie, 107 N. Y. Supp. 767, it was held that the plaintiff could not recover against the town because he was injured by colliding with telephone poles along the highway while attempting to get out of the way of an automobile.

3. Striking person in street.—In an action for injuries to the plaintiff through being struck from behind while oiling the street car tracks by the defendant's automobile, the evidence was held to support the finding that the defendant was negligent and that the plaintiff was not guilty of contributory negligence. King v. Grien, 94 Pac. Rep. 777.

4. Reasonably safe speed.—Brewster v. Barker, 113 N. Y. Supp. 1026; Merkl v. Jersey City H. & P. St. Ry. Company, 68 Atl. Rep. 74.

A bicyclist was run down by an automobile. Where a collision occurred the fact that the person was on the wrong side of the road was *prima facie* evidence of negligence. If the defendant was driving at a high rate of speed it was held to be negligence, and the operator is bound to anticipate meeting persons and vehicles and must keep his machine under control, under Conn. Pub. Acts 1905, ch. 230. That the high rate of speed was an unreasonable one considering the time and place, and one which prevented the defendant

§ 5. Speed at night.

It is astonishing to note that none of the state automobile laws fix a lower speed limit for night than for day driving. It must be conceded that fast driving at night is more hazardous than driving at the same speed during the day time, especially when traveling through villages or settlements. In the large cities there is likely to be less traffic on the streets during certain hours of the night, and there an automobile might therefore safely travel slightly faster than during the day. While none of the states in the Union has so far recognized the greater danger involved in fast driving at night, one of the Canadian provinces has recently passed a law according to which the speed at night must be kept within one-half the limit for day driving.[5]

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from controlling his machine to prevent a collision, though it was less than the maximum statory rate, was held to be a correct instruction, where the law required the rate of speed to be "reasonable and proper, having regard to the width, traffic and use of the highway." Irwin v. Judge, Conn. 71 Atl. 573.

Effect of speed on negligence.—In Freel v. Wanamaker, 57 At. Rep. 563; 208 Pa. 279, the verdict against the owner of a vehicle for injuries to a child was sustained, where the evidence was that the vehicle was driven at a high rate of speed.

In Recard v. Penn. R. R. Co., 67 At. Rep. 1040, it was held that the rate of speed at which an automobile was traveling, from 12 or 15 miles an hour, did not constitute negligence *per se*, but the question of contributory negligence in the case was for the jury.

Excessive speed.—In an action to recover for injuries to the plaintiff's horse and buggy, caused by the defendant driving his automobile on the public highway at an excessive speed, the evidence was examined and held insufficient to warrant a finding for the plaintiff, on the theory that the defendant drove at an excessive speed. Needy v. Littlejohn, 115 N. W. Rep. 483.

5. Speed at night.—The speed at which any vehicle can be driven over a highway at night must be determined partly in view of the distance ahead of it at which travelers upon or approaching the same highway would become visible. Currie v. Consolidated Ry. Co., 71 Atl. Rep. 356.

§ 6. Conviction of speeding.

In an action against the owner of an automobile for causing the death of the plaintiff's decedent by frightening a horse that was being driven on a highway, causing it to run away and collide with a wagon in which the decedent was riding, thereby causing his death, the negligence charged was the failure to stop when warned that the automobile was frightening the horse. It was held, that evidence that the defendant had been convicted of exceeding the speed limits fixed by local ordinances in different places was not competent, as it had no bearing on the question of negligence involved; the violation of local ordinances not being evidence affecting moral character. While evidence of the commission of a crime is generally admissible as bearing on moral character, the violation of local ordinances is generally not a crime, but only a lesser offense, which does not imply any moral turpitude. See v. Wormser, 113 N. Y. S. 1093.

§ 7. Carrying lights.

Automobiles at night must be provided with such means of illumination as may be requisite, in connection with the light, if any, to be expected from other sources, to enable the motorman or chauffeur to see far enough ahead to do whatever ordinary care may demand in order to avoid collision with any other vehicle on the highway.

An automobilist is not necessarily bound as respects other travelers to equip his automobile with a particular kind of light, known, used and approved by those engaged in driving automobiles under like conditions, as the automobilist may be using a light that is better.[6]

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6. Lights. —Currie v. Consolidated Ry. Co., 71 Atl. Rep. 356.

The plaintiff sued for damages resulting from a collision of an automobile, in which he was riding upon a city street, with an iron

Whether it is negligence for the owner of an automobile to run it in the dark without the warning to one approaching from the opposite direction which a headlight gives is a question for the jury.[7]

The fact that there were no numbers on the front lamps of an automobile was held to be not admissible evidence as this could not have contributed to the injury. Evidence that two pedestrians had looked back to see if a car was coming, and their conversation, was held competent to show the precaution taken by them from anything coming from behind.[8]

Where the chauffeur testified that there were four lamps on the machine all lighted, and on cross examination stated that he understood that the law required that any two of

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trolley pole, as the result of a sudden turn of the vehicle to avoid the gates of a railroad-crossing which had been lowered. The accident occurred at night. The case showed that the plaintiff's headlights were burning, but that the usual lights upon the gates were not, and that as to the brightness of the street and other lights in the vicinity, the evidence was conflicting. The case was tried before a judge without a jury, who gave judgment for the plaintiff against the railroad company, the defendants. On appeal it was held that the absence of the lights usually attached to the gates was sufficient evidence of negligence to make it a jury question. Recard v. Penn. R. R. Co., 67 At. Rep. 1040.

Search lights in city prohibited. —The New York Board of Aldermen has recently amended Section 458 of the Code of Ordinances of the city of New York, relating to vehicle lighting, by adding the following: "No operator of any automobile or other motor vehicle, while operating the same upon the public highway, within the city, shall use any acetylene, electric or other headlight, unless properly shaded so as not to blind or dazzle other users of the highway, or make it difficult or unsafe for them to ride, drive or walk thereon."

7. Negligence.—Wright v. Crane, 106 N. W. Rep. 71, 12 Det. Leg. N. 794.

8. Numbers on front lamps. —Belleveau v. Lowe Supply Co., 86 N. E. Rep. 301.

the lamps in front should have the number of the machine, the refusal to permit the plaintiff to go into the matter whether there were any numbers on either light was not erroneous, no claim being made that a violation of the law contributed to the accident.[9]

§ 8. Driving on railway tracks.

Where a person has the right to use the tracks of an electric railway company, by running an automobile thereon, he must use care and caution in so doing, and if he knows that a car is coming from the rear, he must use more than ordinary care and caution, and he is guilty of contributory negligence if he fails to do so.[10]

Persons dismounting from street car.—One, who is dismounting into a street from a street car, has a right to expect that anyone driving up from behind in an automobile will exercise proper care to avoid running into him.[11]

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9. Materiality of evidence.—Belleveau v. S. C. Lowe Supply Co. 86 N. E. Rep. 301.

10. Driving on tracks.—Watts v. Ry., 34 C. C., 369, Pennsylvania.

While engaged in oiling street car tracks, the proper discharge of which duty required him to move backwards along the rail, the plaintiff was struck from behind by the defendant's automobile. He was facing at the time in the direction from which any car or vehicle obeying the law of the road would approach. Held, that the question of the plaintiff's contributory negligence was for the jury. King v. Grien, 94 Pac. Rep. 777.

Street car running into automobile.—Foley v. Railway Co., 112 N. Y. App. Div. 649.

Street car striking automobile.—Evidence as to the striking of an automobile by a street car held sufficient to take the question of the company's negligence to the jury. Lehman v. New York City Railway Company, 107 N. Y. S. 561.

11. Dismounting.—There is no absolute rule of law requiring one, before dismounting from a street car into a street, to look up and down the street to see if there is any danger from passing

Grade crossings.—As long as grade crossings exist catastrophes will occur, and the question arises which of the two parties concerned, the railroad or the highway traveler, is to blame. In all the recent discussion concerning grade crossing accidents to motorists one point on which the whole question of legal liability may hinge has utterly escaped attention, namely, that almost every state law requires the automobile driver to reduce his speed to a very low rate when crossing intersecting highways. This provision of the statutes is one of those least obeyed; but few arrests are made for its violation, probably because the law is unknown to police officials.

There can be no question that a railroad crossing a public highway stands in the same relation to the highway as though it were a common highway itself. In fact, a railroad comes within the meaning of the term "public highway" as employed in our motor vehicle laws. Consequently, an automobile driver is compelled to materially decrease his speed when he approaches a railroad crossing. In most of the states the speed limits at such crossings are from 4 to 6 miles an hour.

Violation of the law providing for speed reduction at intersecting highways puts the automobilist at fault, at least *prima facie*, and the fact that he was driving too fast at the time of the accident is a circumstance damaging to him if he should proceed at law for recovery for any injury in-

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vehicles. McGourty v. De Marco, 200 Mass. 57; *Citing* Hennessey v. Taylor, 189 Mass. 583; Murphy v. Armstrong Transfer Co., 167 Mass. 199; Bowser v. Wellington, 126 Mass. 391.

It is negligence for a person in charge of an automobile to run it along the street past a street car, that has stopped to allow persons to get off and on, at a rate of six or seven miles an hour. Brewster v. Barker, 113 N. Y. S., 1026.

A passenger alighting from street car is not bound to look to the right and left for danger. Brewster v. Barker, 113 N. Y. S., 1026.

flicted. Unless he can prove negligence on the part of the railroad, his case is a hopeless one.

More emphasis should be laid upon compliance with the speed regulations at crossings and in turning corners, for at these places the danger due to fast driving is far greater than that due to driving at 25 miles an hour over a straight, unobstructed course.

It is well settled, that a traveler approaching a railroad track is bound to use his eyes and ears so far as there is an opportunity, and when, by the use of those senses, danger may be avoided, notwithstanding the neglect of the railroad servants to give signals, the omission of the plaintiff to use his senses and avoid the danger is concurring negligence, entitling the defendant to a nonsuit. This rule applies to a passenger in a vehicle approaching a railroad, as well as to the person in charge of the motive power of the vehicle. But, in determining in each particular case whether or not a failure to look or listen was negligence that contributed to the accident, the age, condition, and situation of the plaintiff, the existing circumstances are to be taken into consideration. It is not in every case that a failure to look or listen would be negligence, as in the case of a passenger in a street car approaching a railroad track, where the car is entirely under the control and management of those charged with its management, or in the case of a very young child in a conveyance approaching the track.[12]

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12. **Grade crossings.**—Noakes v. N. Y. Cent. etc. R. Co., 106 N. Y. Supp. 522.

CHAPTER XIII.

PROOF OF SPEED.

§ 1. Evidence of chauffeur or operator.

Naturally, evidence as to the speed of an automobile is of more or less value or weight according to the situation of the witness at the time of the speed and the witness' experience. A child observing a passing automobile would, of course, be incapable of giving reliable testimony as to its speed, so also would the testimony of an adult be unreliable where his eyesight is impaired In fact most per-

sons under normal conditions would not be able to give testimony from observation which would warrant a determination in accordance therewith. The question arises, "Who constitutes a reliable witness as to the speed of an automobile?" Considering all the rules that have been promulgated concerning the weighing of testimony or evidence the party controlling the operation of a passing object, such, for example, as the chauffeur or operator of an automobile, should be regarded by the courts as one of the best and most reliable witnesses as to the speed of his machine if he is to be believed so far as truthfulness is concerned.[1] The chauffeur or operator of an automobile, having control of the vehicle, is the custodian, so to speak, of the speed. This is an important consideration. His testimony should be especially valuable if it consists not merely of any expression of his judgment or opinion, but of what he actually did in the way of regulating the speed; since, in the latter case it might be necessary for the trier of facts to find him guilty of perjury if his testimony is not to be credited, and very strong evidence is always required to justify that severity. Where, for example, the chauffeur or operator is able to testify as to what he did in reference to shutting off the power, applying the brakes, or any other matter pertaining to the regulation of the speed, this should furnish, at least, strong corroborative evidence. Because the chauffeur is so closely in touch with the automobile's movements, courts should give great weight to his evidence, if, as said before, it is truthful.

§ 2. Observers may give estimates.

Those who observe a passing object or automobile may testify to their estimates of its apparent speed without qual-

1. See Bowes v. Hopkins, 84 Fed. Rep. 767; N. Y. Transp. Co. v. Garside, 157 Fed. Rep. 521.

ifying as experts, although their testimony may not be of much weight as compared with the testimony of those who have been accustomed to make and verify estimates of the speed of moving objects.[2] Thus it has been held that an observer may testify as to his estimate of the rate of speed of a dummy engine,[3] an electric car,[4] and a carriage which of course specifically covers the automobile.[5] In the case of Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99, 104, it is said: "Any intelligent man, who has been accustomed to observe moving objects, would be able to express an opinion of some value upon it the first time he ever saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with time-piece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony and not to its admissibility." It may be testified that the automobile was going at a certain estimate of speed as compared to other modes of motion;[6] thus a witness who was an observer may be permitted to testify that the machine was moving at a snail's pace, or no faster

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2. Kansas, etc., R. R. Co. v. Crocker, 95 Ala. 412, 11 So. Rep. 262; Louisville, etc., R. Co. v. Jones, 108 Ind. 551, 9 N. E. Rep. 476; Detroit, etc., R. Co. v. Steinburg, 17 Mich. 99.

3. Highland Avenue, etc., R. Co. v. Sampson, 112 Ala. 425, 20 So. Rep. 566.

4. Eclaigton, etc., R. Co. v. Hunter, 6 App. Cas. (D. C.) 287; Potter v. O'Donnell, 199 Ill. 119, 64 N. E. Rep. 1026; Mertz v. Detroit Electric R. Co., 125 Mich. 11, 83 N. W. Rep. 1036; Mathieson v. Omaha St. R. Co., (Neb. 1902) 92 N. W. Rep. 639; Fisher v. Union R. Co., 86 N. Y. App. Div. 365, 83 N. Y. Supp. 694; Toledo Electric St. R. Co. v. Westenhuber, 22 Ohio Cir. Ct. Rep. 67, 12 Ohio Cir. Dec. 22; Sears v. Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. Rep. 389; Robinson v. Louisville R. Co., 112 Fed. Rep. 484, 5 C. C. A. 357.

5. Brown v. Swanton, 69 Vt. 53, 37 Atl. Rep. 280; Porter v. Buckley, 147 Fed. Rep. 140, 78 C. C. A. 138.

6. Kansas City, etc., R. Co. v. Crocker, 95 Ala. 412, 11 So. Rep. 262.

than a man walks, or faster than a man could run.[7] Testimony that the speed was dangerous,[8] "very fast,"[9] "fast,"[10] "high,"[11] "reckless,"[12] and "unusual"[13] is admissible. Ignorance of the witness as to the number of feet or rods in a mile will not incapacitate his testimony. Thus the testimony of a witness who estimates the speed of an automobile at a certain number of miles per hour will not be struck out because, on cross-examination, he confesses that he does not know how many feet or rods there are in a mile.[14]

§ 3. Qualifications of observers.

It has been held, and it is probably the correct view, that an observer of a passing object in order to testify as to its speed must qualify to the extent of showing a measure of experience and observation which will make his opinion fairly reliable. As said before, the evidence of some parties, it would seem, could not be admissible on the speed of an automobile. Clearly one not in possession of the necessary faculties could not testify.[15] It has been laid down that observation and knowledge of time and distance are all that

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7. Kansas City, etc., R. Co. v. Crocker, 95 Ala. 412, 11 So. Rep. 262.

8. Lockhart v. Litchtenthaler, 46 Pa. St. 151. But see Alabama Great Southern R. Co. v. Hall, 105 Ala. 599, 17 So. Rep. 176.

9. Johnson v. Oakland, etc., Electric R. Co., 127 Cal. 608, 60 Pac. Rep. 170.

10. Illinois Cent. R. Co. v. Ashline, 171 Ill. 313, 49 N. E. Rep. 521.

11. Black v. Burlington, etc., R. Co., 38 Iowa 515.

12. Galveston, etc., R. Co. v. Wesch, (Tex. Civ. App. 1893) 21 S. W. Rep. 62.

13. Johnsen v. Oakland, etc., Electric R. Co., 127 Cal. 608, 60 Pac. Rep. 170.

14. Ward v. Chicago, etc., R. Co., 85 Wis. 601, 55 N. W. Rep. 771.

15. Grand Rapids, etc., R. R. Co. v. Huntley, 38 Mich. 537.

are necessary to an inference.[16] As additional requirements sound mind and judgment have been suggested.[17] Of course one who has timed automobiles is a competent witness.[18]

§ 4. Weight of evidence.

The testimony of an observer of a passing automobile that the machine was running "fast" or "slow" cannot, it is said, be excluded merely because of its indefiniteness.[19] On the other hand, it has been declared that such testimony "is altogether too uncertain for judicial action, and most especially so when there was no collision."[20] It was observed by Chief Justice Campbell in Grand Rapids, etc., R. R. Co. v. Huntley, 38 Mich. 540, that "opinions on relative speed without some standard of rapidity are of no value by themselves."

§ 5. Incorrect estimates.

Where an estimate is made by a witness as to the speed of a passing automobile, the facts should be stated upon which the estimate is made,[21] and in order to give his testimony any value it should be shown that the witness had adequate facilities for observing the automobile's movement.[22] Thus it has been held that passengers riding on a train are not competent to estimate from observation the rate of

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16. Chicago, etc., R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. Rep. 708.

17. Chicago, etc., Co. v. Clark, 26 Neb. 645, 42 N. W. Rep. 703.

18. Thomas v. Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. Rep. 547.

19. Illinois Cent. R. R. Co. v. Ashline, 171 Ill. 313, 49 N. E. Rep. 521.

20. Yuigst v. Lebanon, etc., R. R. Co., 167 Pa. St. 438, 31 Atl. Rep. 687, *per* Green, J.

21. Union Pac. R. Co. v. Ruyicka, 65 Neb. 621, 91 N. W. Rep. 543.

22. Muth v. St. Louis, etc., R. Co., 87 Mo. App. 422.

speed at which the train traveled.[23] But such evidence has been admitted.[24] It should also be shown that the facilities for observing the speed were improved by the witness.[25]

§ 6. Imagination.

The imagination is likely to deceive a party as to the speed of an automobile. For example, a pedestrian crossing a street would be quite likely to erroneously estimate the speed of an approaching automobile, and if run down by it, he would easily imagine that its speed was suddenly increased, or that it had been in no degree slackened.[26]

§ 7. Line of vision.

The line of vision is a matter of great importance in determining the speed of a passing object. It would be impossible for an observer directly facing an automobile, approaching him in a straight course, to estimate its speed with a degree of accuracy anywhere near the precision he could attain if his line of vision was transverse to the direction in which the machine was moving. So, also, it would be almost impossible to give a correct estimate of the speed where the automobile is traveling in a direct line away from the observer.[27]

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23. Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321.

24. Johnson v. Oakland, etc., Electric R. Co., 127 Cal. 608, 60 Pac. Rep. 170; Galveston, etc., R. Co. v. Wesch, (Tex. Civ. App. 1893) 21 S. W. Rep. 62.

25. Mathieson v. Omaha St. R. Co., 3 Neb. (Unoff.) 743, 92 N. W. Rep. 639.

26. See remarks of Collins, J., in an analogous case, Schmidt v. New Jersey Street R. R. Co., 49 Atl. Rep. 438, and Dean, J., in Gangawer v. Phila., etc., R. Co., 168 Pa. St. 265, 32 Atl. Rep. 21.

27. See Huntress v. Boston, etc., R. R. Co., 66 N. H. 185, 34 Atl. Rep. 154; Colo., etc., R. R. Co. v. Robbins, 71 Pac. 871; Munster v. Chicago, etc., R. Co., 61 Wis. 325, 50 Am. Rep. 141.

§ 8. Time consumed.

The duration of time is a matter of fact which concededly a witness may state in the form of an estimate, but when a witness gives his estimate of the time consumed by the automobile in passing from one point to another, and the distance between the points is ascertained by measurement, the testimony is not of much weight. No experienced judge leans upon a witness' estimate of a short period of time further than to believe that it was a brief period. Cases on this point are numerous and emphatic. "Nothing is more uncertain or unreliable than the testimony of witnesses as to the time occupied in a transaction" said Vice-Chancellor Green in McGrail v. McGrail, 48 N. J. Eq. 532, 22 Atl. Rep. 582. "There is no matter upon which witnesses are so likely to be mistaken as a question of time," said Bruce, J., in The Wega, Prob. Div. [1895] 156, 159. "People differ widely as to the estimation of passing time—particularly is this so in naming minutes or seconds that may be thought to expire on any particular occasion," said Gill, J., in Culberson v. Chicago, etc., R. Co., 50 Mo. App. 556, 562.

§ 9. Noise.

The noise produced by an automobile would be apt to deceive a party in his estimation of the automobile's speed, since at very slow speeds, and even where there is no motion of the vehicle at all, there are times when the motor runs very fast. This naturally would lead one to believe, if depending upon sound alone, that the automobile was actually traveling at a rate of speed which the motor could produce with the same noise The unreliability of testimony founded in any way upon the noise produced needs no further argument to stamp such evidence as almost worthless. As bearing on this subject it has been held that a per-

son was not competent to express an opinion as to the speed of a car, founded upon the noise when at a distance of more than one hundred and twenty feet, on a mere showing that the witness had for twenty years the common experience of a city man traveling on street cars.[28] Of course speed may be judged from hearing rather than from sight.[29]

§ 10. Facts incompatible with estimates.

Where the facts show a conflict between an observer's estimate of the automobile's speed, the facts control. Estimates of speed, as in cases of all other kinds of "opinion" evidence, must give way to testimony of cold matters of fact and legitimate inferences therefrom.[30] Take an example where testimony to a high degree of speed is incompatible with the proved facts that the machine was stopped within a few feet, or a short distance, the latter evidence must prevail.[31] Undoubtedly the converse proposition is also true that an estimate of the low rate of speed must be overruled by indubitable proof of facts reconcilable only with high speed, such as the force of the impact of a machine (Brenan v. Metropolitan St. R. Co., 60 N. Y. App. Div. 264, 69 N. Y. Supp. 1025), or the considerable distance traversed by the machine despite efforts to bring it to a standstill.[32]

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28. Campbell v. St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. Rep. 86. See also Robinson v. Louisville R. Co., 112 Fed. Rep. 484, 50 C. C. A. 357.

29. Van Horn v. Burlington, etc., R. Co., 59 Iowa 33, 12 N. W. Rep. 752; Missouri Pac. R. Co. v. Hilderbrand, 52 Kan. 284, 34 Pac. 738.

30. Muster v. Chicago, etc., R. Co., 61 Wis. 325, 50 Am. Rep. 141; Retterstrom v. Brainsford, etc., R. Co., 94 N. W. Rep. 882.

31. Graham v. Consol. T. Co., 54 N. J. Law 10, 44 Atl. Rep. 964; Volger v. Central, etc., R. Co., 83 N. Y. App. Div. 101, 82 N. Y. Supp. 485.

32. Railroad Co. v. Bordenchecker, 70 N. E. Rep. 995; Zolpher v. Camden, etc., R. Co., 55 Atl. Rep. 249; Hoppe v. Chicago, etc., R. Co., 61 Wis. 357.

§ 11. Distance.

An estimate of speed necessarily involves an estimate of distance where it is sought to determine the mathematical rate of speed. However, estimates of distance are perhaps even less trustworthy, in point of absolute accuracy, than estimates of speed. In Zolpher v. Camden, etc., R. Co., 55 Atl. Rep. 249, estimates of various witnesses ranged all the way from three feet to forty feet, and in Cannon v. Pittsburg, etc., B. T. Co., 195 Pa. St. 159, 44 Atl. Rep. 1089, the extreme estimates were sixty feet and one hundred and forty feet.

§ 12. Speed at one place inadmissible as to speed at another.

Is testimony to speed of a machine at one place admissible on the question of speed in another place on the same road? It is safe to say that ordinarily it would not be relevant. If, however, it were conceded—by the chauffeur, for instance—that the speed had not been accelerated or diminished, as the case may be, between the two points, such testimony would be clearly admissible.[33]

§ 13. Effect of bias.

Bias of witnesses is one of the most pestiferous factors with which courts have to deal in weighing testimony. Where it is sought to prove that an automobile was running at an unreasonable speed, or at a speed prohibited by statute or ordinance, it is highly probable that witnesses who voluntarily testify against the motorist will be biased, considering the present state of public opinion in some localities. Courts frequently take judicial notice of prejudice that usually exists against corporations, and it may be presumed that they would take like cognizance of the animosity against

33. Louisville, etc., R. Co. v. Jones, 108 Ind. 551, 9 N. E. Rep. 476.

automobilists. At any rate the partisanship of witnesses testifying to excessive rates of speed is likely to crop out in their testimony so as to justify the trier of fact in putting them in the category of biased witnesses. Now, what is the rule in weighing the testimony of such witnesses? So far as it pertains to the present discussion the rule is this: In matters of opinion the witness is to be distrusted.[34] The term opinion includes estimates of time, distance, speed, etc. In practice judges should give very little weight to the opinions of biased witnesses; for besides the unconscious operation of bias in warping the judgment of an honest witness, an effect universally conceded, bias may readily have a more sinister influence in view of the fact that it is virtually impossible to obtain a conviction for perjury in falsely testifying to an opinion. Bias of a witness, which we have already noticed, when he speaks of minutes or seconds not measured by a timepiece, is always certain to perturb his judgment. Ridge v. Penn. R. R. Co., 58 N. J. Eq. 172, 43 Atl. Rep. 275, furnishes an excellent illustration. There an injunction was sought against a railroad company to restrain it from maintaining a nuisance at a city crossing by suffering its freight trains to block the highway for an unreasonable time. Many witnesses on each side testified to the length of time which they were compelled to wait on various occasions. One witness swore by his watch. That was very good evidence. Vice-Chancellor Reed intimated that other witnesses in the service of the company or related to some one in such service would be disposed to overlook any discomfort from obstruction by trains and would underestimate the delay. On the other side, angry pedestrians who were in a hurry to get to their

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34. Lockwood v. Lockwood, 2 Curt. Eccl. 281, 289, *per* Dr. Lushington.

business or other destination would exaggerate the time of waiting.

§ 14. Burden of proof.

But, it may be replied, if witnesses are biased in favor of the prosecution, it is also certain that the chauffeur or occupants of the automobile are decidedly interested in their own behalf, and that their testimony is equally unreliable—that all are "in the same boat," as the phrase goes. This may be conceded. The burden of proof, however, is on the prosecution, and if it can do no better than to leave the evidence in equipoise—if it cannot produce a preponderance of credible evidence, or proof beyond a reasonable doubt, as is required for a conviction in criminal cases—then, according to the familiar rule, the prosecution fails to establish its contention.

§ 15. Evidence under English law.

The English Motor Car Act provides that no person shall be convicted of driving an automobile over the rate of 20 miles an hour merely on the opinion of one witness as to the rate of speed. Upon the hearing of an information under Section 9 of this act, for driving an automobile on a public highway at a speed exceeding 20 miles an hour, a police sergeant proved that he placed a police constable at a certain point on the road and stationed himself on the same road at a distance of a quarter of a mile from the constable; that when the automobile passed the constable the constable signaled to him, and he immediately started the second hand of his stop watch and stopped the same when the car passed him, and that the time taken by the car between the two points, as shown by the stop watch, was 31 2-5 seconds, or at the rate of 28 miles an hour. The stop watch was produced in court and not objected to. The

only evidence as to the rate of speed was that of the police sergeant, who gave evidence of the time as shown by his stop watch. The defendant was convicted. On appeal it was held that the evidence of the police sergeant was not evidence of his "opinion" merely, but was evidence of the fact recorded by his stop watch as to the time taken in traveling over the distance, and that, therefore, the defendant was not convicted "merely on the opinion of one witness as to the rate of speed" within the meaning of Section 9, sub-section 1, of the act. See Plancq v. Marks, K. B. D.; 94 L. T. 577.

§ 16. Evidence that vehicle "went fast."

Evidence that a vehicle "went fast" is no proof that its speed was excessive. There must be testimony showing a breach of the standard of speed, and no jury can have the liberty to deal with such a question unless there is practical evidence in the case upon the subject. Starr v. Schenck, 25 Mont. L. Rep. (Pa.) 18.

§ 17. High rate of speed.

Where, in an action against a street railroad for injuries to one who was struck by a car, the undisputed evidence showed that the car was running at a high rate of speed at the time of the accident, it was not error to refuse to strike out the testimony of a witness that the car was running at the rate of 20 miles an hour at the time of the accident, the witness stating on cross-examination that he knew it was going at that rate because he knew it to go "very fast out there." The same ruling applies to an automobile. Eckels v. Muttschall, 82 N. E. Rep. 872.

Where the Plaintiff is the only witness that the speed of defendant's automobile was excessive, and that he sig-

nalled him to stop, and is contradicted by the defendant and four witnesses and there is ground for the contention that the accident was caused by the fright of the horse, but no evidence that such fright was caused by the defendant's automobile, a new trial will be granted on verdict for the plaintiff. Siberman v. Huyette, 22 Mont. 39.

§ 18. Comparative amount of noise.

Testimony as to the comparative amount of noise made by different makes of automobiles, based upon comparisons made by the witness, was properly excluded where there was no proof of the condition of the machines with which the test was made. Porter v. Buckley, 147 Fed. Rep. 140, 78 C. C. A. 138.

§ 19. Distance in which object could be seen.

Evidence as to the speed of an automobile necessarily involves an estimation of distance, so it is of importance to the automobilist who has a speed case to defend to understand what testimony is admissible bearing upon distance. In Arkansas & L. R'way v. Sanders, 99 S. W. Rep. 1109, it was held that after pointing out the place of the accident to plaintiff, it was not error to permit witnesses to testify as to the distance the driver of a vehicle could have seen the object struck.

§ 20. Meeting horses.

On a trial for a violation of the Wisconsin Laws of 1905, p. 469, c. 305, Sec. 4, requiring the operator of an automobile, under certain conditions, to stop, evidence of the speed of the automobile at the time of approaching and meeting the complainant may be proper. McCummins v. State, 112 N. W. Rep. 25.

§ 21. Passenger in automobile.

The fact that a witness was a passenger in an automobile does not render him incompetent to certify as to its speed. Goodes v. Lansing & Suburban Traction Company, 114 N. W. Rep. 338.

§ 22. Summary and conclusion.

The conclusion is that evidence of speed consisting of mere opinions of witnesses is very unsatisfactory where accurate knowledge is essential, especially if the witnesses are biased; that it is inferior in weight to inferences derived from significant and well-established facts; and that the best evidence is the testimony of a witness who noted the time by a speed indicator, or by a stop watch on a measured course. Where the speed indicator of an automobile and the stop watch of an officer conflict as to the rate of speed, assuming that both instruments are accurate, it would seem that the speed indicator should control the determination of the speed, since it is purely mechanical and involves no judgment, while the stop watch is not automatic so to speak, but requires action on the part of the officer and some judgment in using the watch.[35]

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35. A statement cannot be given in evidence where it is not based upon adequate observation and capacity for co-ordination, but is arrived at merely as the result of a mathematical calculation made after the event. Mathieson v. Omaha St. R. Co., (Neb. 1903) 97 N. W. Rep. 243.

CHAPTER XIV.

UNLAWFUL SPEEDING ON THE PUBLIC HIGHWAYS.

§ 1. Common law misdemeanor.

To operate a vehicle along a public road or street, greatly to the danger and inconvenience of all persons traveling along said highway, is such a wrong as injuriously affects the rights of the public, who are entitled to travel along such public thoroughfare, laid out and kept up by the public for their convenience and accommodation, without exposure to such danger and inconvenience. While any person may drive his vehicle at such speed as he may please, yet, in enjoying the privilege of free use of his property, he has no right to expose others to injury or to infringe upon the rights of the general public. Running and racing a vehicle along a public road, no necessity being shown for

such speed, is not the ordinary and proper mode in which such roads are used by prudent men. They were not intended, by the very purpose for which they are opened and kept up, for any such use, but for the ordinary and usual travel of the public. Speeding and racing on the public highways are well calculated to disturb public order and the public rights are violated.

To run a race on a public highway or to excessively speed a vehicle, to the danger and inconvenience of people, is a common law misdemeanor. It is proper to add, that there may be necessity for riding at high speed along even the public road, as in cases of sickness, or to give a neighbor notice of great personal danger to his property. Such necessity is a matter of defense.[1]

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1. **Speeding misdemeanor under common law.**—State v. Battery, 6 Baxt. (Tenn.) 545. See also Redman v. State, 33 Ala. 428.

A right of highway does not include a right of racing, and a person who had been a party to a hurdle race is jointly liable for putting the hurdles on the ground, although he took no actual part in the race.—Sowerby v. Wadsworth, 3 F. & F. 734.

That horse racing is illegal, see: State v. Burgett, Smith 340; Watson v. State, 3 Ind. 123; Robb v. State, 52 Ind. 218; State v. Fleetwood, 16 Mo. 448; State v. Wagston, 75 Mo. 107; Goldsmith v. State, 38 Tenn. (1 Head) 154; State v. Catchings, 43 Tex. 654.

It is an offense for a person to permit his vehicle to be run in a race on a public highway, and a separate offense for a person to act as a driver in such a race.—State v. Ness., 1 Ind. (1 Cart.) 64; see also Watson v. State, 3 Ind. 123; State v. Fidler, 26 Tenn. (7 Hump.) 502; Goldsmith v. State (38 Tenn. 1 Head 154, holding that a bet or a wager is immaterial.

A right of highway does not include a right to race, and a person who had been a party to a hurdle race is jointly liable for putting the hurdles on the ground, although he took no actual part in the race.—Sowerby v. Wadsworth, 3 F. & F. 734.

Speed at crossing.—In a city ordinance limiting the speed of automobiles on "streets" of city and at "crossings," the word "crossings" refers to street crossings.—Elchman v. Buchheit, 128 Wis. 385.

Necessity for signs indicating reduction of speed.—A city

§ 2. **Misdemeanor under automobile laws.**

Under the automobile laws the offense of driving an automobile at an excessive rate of speed not being punish-

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ordinance limiting the speed at which automobiles may be run in certain portions of a city is not rendered invalid for uncertainty by the fact that it makes no provision for the erection of signs at points where areas of limited speed begin.—Eichman v. Buchheit, 128 Wis. 385.

Private track racing.—Generally speaking, one has the right to do as he pleases with and upon his own private property, and it is apparently, at least, by virtue of this right of property that public automobile races are said to be permissible on private tracks. But is private race track racing any more "legal" than racing on the public highways? Danger, morality, public policy, statutory and common law, all prohibit speed contests on the public ways. A private way stands in no different position, except that the ground over which the automobile race is conducted is private and belongs to one or more individuals. But, even though the race track is private, nevertheless, does it not constitute a public, or at least a *quasi*-public, place? If so, can it be considered at all different to the public highway in so far as the question of automobile racing is concerned? The public is invited to the private track; it is urged to come by the thousands to see the "death daring" drivers, and, it may be added, in most cases to witness violent death. We have seen from experience that automobile racing, no matter where conducted, inevitably leads to injury and death. Would a bull fight be sanctioned in the United States? Is dueling lawful? Compare automobile racing, with its slaughter, its gambling, betting and contagious speed mania, with bull fighting, prize fighting and dueling, and who can say which is the more harmful? Then again, the example which the automobile driver sets by recklessly placing his life in jeopardy is bad, especially on youth, which is not debarred from witnessing auto-homicdal spectacles. Moreover, we find that such race tracks may be constructed with utter disregard for the safety of spectators. There are no state or municipal regulations governing automobile speed contests upon private tracks, because exhibitions of this kind are comparative "sporting" innovations, and law makers have not, until recently, at least, been impressed with the necessity for legislation. But laws which will either prohibit or so regulate them that some of their worst features will be done away with will come, if indeed, the track racing mania does not die of its own excesses without even a coroner's inquest to determine the cause.

able by imprisonment in the state prison, but by a fine, is a misdemeanor and not a felony. Com. v. Sherman, 191 Mass., 439; 78 N. E. Rep., 98.

§ 3. Faster than common traveling pace.

A most interesting legal question has just been decided by the Supreme Court of *Rhode Island*. An automobilist was prosecuted under an old Rhode Island statute which prohibited persons driving vehicles faster than "a common traveling pace." Just exactly what a common traveling pace is or should be was the fact for determination by the court. Since we have in our automobile laws specific prohibitions against unreasonable and dangerous driving, the decision of the Rhode Island Supreme Court is important and instructive. The opinion of the court says:

"It is clearly evident that the safety of the traveling public was the object sought by the act. Such safety could not be attained by permitting each vehicle, each horse or other thing, which could be ridden or driven, to go at a traveling pace possible to it. There could not be, with safety to the traveling public on foot, on horseback or in carriages, a traveling pace for each individual who rode in the streets or highways, fixed only by the rate of speed possible to the animal or thing which he rode or drove. Safety could not be attained only by requiring all to use that prudence and caution in the matter which was ordinarily used by prudent and reasonable men when driving in the streets or highways of thickly settled towns; that is, a pace which was reasonable and proper, considering the place and circumstances, a pace which was recognized by reasonable men as a common traveling pace. State v. Smith, 69 Atl. Rep., 1061." [2]

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2. **Laws which create crimes,** ought to be so explicit in themselves, as by reference to some known standard, so that all may know

§ 4. Criminal responsibility for agent's driving.

Under the *Pennsylvania* Act of April 19, 1905, regulating the speed of automobiles, the record of a justice will not be sustained if there is nothing to connect the defendant with the car or the act. The owner of an automobile will not be liable, if it is used without his knowledge, or his consent; otherwise, he could be sent to jail for an act done without his knowledge, by persons for whose acts he would not be responsible. Comm. v. Bacon, 24 Mont. L. Rep. (Pa.) 197.

§ 5. Liability of parties not driving.

An English automobilist was convicted of unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the case on appeal there was a conflict of evidence as to whether the car was being driven by the appellant or by a lady seated by his side in the car. The court, without deciding who was driving the car, dismissed the appeal, at the same time finding in fact that if the lady was driving she was doing so with the consent and approval of the appellant, who must have known that the speed was dangerous, and who, being in control of the car, could and ought to have prevented it. The court found that there was evidence on which the appellant could be convicted of aiding and abetting the commission of a crime. Du Cros v. Lambourne, Div. Ct. 40.

§ 6. Persons in tonneau.

In a prosecution for operating an automobile at an excessive rate of speed, proof that the machine, which was registered with the Massachusetts Highway Commission by the

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what they prohibit and all men may know what it is their duty to avoid. U. S. v. Sharp, 1 Pet. C. C. Rep. 118.

defendant in his own name, was being run by the operator at an illegal speed while the defendant was in the tonneau, established *prima facie* that the defendant, having power to control the machine, either knew or allowed it to be illegally run, and was therefore guilty. Com. v. Sherman, 191 Mass., 439; 78 N. E. Rep., 98.

§ 7. Aiding and abetting.

A person who is prosecuted for driving an automobile at a speed dangerous to the public may be convicted, although it may appear that he was not actually driving at the time, but was in fact aiding and abetting the commission of the offense. Buford v. Sims (67 L. J. A. B. 655; [1898] 2 A. B. 641). Du Cros v. Lambourne, Law J. Rep. 1907 (K. B. D.) 50.

§ 8. Identification of offender.

There can be no conviction for violating the speed law where the only evidence to connect the defendant with the case is the fact that according to the automobile register a machine having the same number as the one used in violation of the law belongs to the defendant. Scranton v. Hawley, 9 Lack. (Pa.) 65.

§ 9. Prosecution on more than one charge.

Frequently an automobile driver is arrested for overspeeding, and when formal complaint is made against him, he not only faces a charge of exceeding the speed limit, but sometimes is held to answer another accusation of "dangerous driving." Especially is this the case where there were aggravating circumstances connected with the alleged offense or the arrest.

Necessarily in many instances the operation for an automobile at a great speed on the public highways, consti-

tutes "dangerous driving," but where the public prosecutor complains against the defendant for dangerous driving and has him convicted on that charge, it is not within his power to convict the accused on the charge of exceeding the speed limit, notwithstanding the fact that in America, particularly New York city, this is the custom of the District Attorney's office. This practice is illegal for the following reason:

If the court takes into consideration the speed of the automobile on the hearing of the dangerous driving charge, and if the defendant is then prosecuted on the second charge of violating the speed limit, he is placed in jeopardy twice, which is prohibited by all our State constitutions and the common law. See Welton v. Tanebourne (Div. Ct. Eng. 873, Vol XXIV, Law Times Rep. No. 36, p. 873).

§ 10. Violation of municipal ordinance.

Where, in a prosecution for operating an automobile at a speed in excess of that prescribed by the by-laws of a town, it was agreed that such by-laws were "duly established," such stipulation admitted that the by-laws were advertised and posted as provided by Mass. Stat., 1905, p. 289, ch. 366, Section 1, and that they were made as authorized by such act, and that the place covered by them was within the thickly settled part of the town. Com. v. Sherman, 191 Mass., 439; 78 N. E. Rep., 98.

§ 11. Obstructing police.

Two constables in England, having measured certain distances on a road much frequented by automobiles, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. An automobilist was arrested, but he gave warning of the

police trap to approaching cars, which then slackened speed. There was no evidence that the accused was acting in concert with any of the drivers of the cars, or that any car when the warning was given was going at an illegal pace. The court held that the defendant was not guilty of the offense of obstructing the officers in the execution of their duties. Bastable v. Little, Div. Ct., 59.

§ 12. Excuses for speeding.

Many and various are the excuses that are offered by drivers accused of speeding, the following being a few of those most commonly given: There was a sick person in the car; a physician was speeding to the bedside of a patient; it was raining hard; the car was speeded up temporarily to get out of the dust of the car ahead. In some instances magistrates and judges have discharged motorists for one of the above reasons, while in other cases they have utterly refused to listen to excuses of this nature. May there not be circumstances under which the operation of an automobile at excessive speed is excusable morally and legally, and which is the proper course for a judge to pursue?

The various State automobile laws say that motor vehicles shall not be driven faster than certain rates of speed. There are no exceptions or provisos in these laws permitting the speed limits to be exceeded under any circumstances, consequently there exists no judicial discretion to discharge arrested automobilists on any of the grounds mentioned; however, since all laws must be enforced by means of human agency, "humanity" must necessarily enter into the execution of any particular statute. It should not be forgotten that "intention" has no place in violations of the speed law. Whether the arrested automobilist "knew" that he was exceeding the speed limit makes no difference in regard to his innocence or guilt. The law says that he

who operates an automobile drives it at his peril if he exceeds the speed limit. But there is certainly an unfairness in "trapping" an automobilist who does not intentionally speed for the sake of creating a race or showing off. Just what to do to prevent oppression by officers of the law on the one hand and to curb reckless automobiling on the other is the great question.

Speed traps and the practice of convicting automobilists on mere "seconds" and "mathematics" should be abolished. Yet alertness on the part of the protectors of the public safety should not be discouraged. Where will we strike the happy medium? Connecticut is said to have solved the problem, but this may be doubted. In that State danger to the public is the test up to 25 miles an hour, and it is rather difficult to produce evidence establishing dangerous driving when it did occur.

First, and above all, a limited discretion should be given magistrates and judges to excuse those arrested for speeding who present plausible and bona fide reasons in mitigation of the offense and where the arrest is purely technical. Secondly, no automobile driver should be convicted on the uncorroborated evidence of one person using a stop watch or otherwise estimating the time. Secret evidence, wholly within the possession of one party, should not be permitted to convict a defendant. The opportunity to ascertain the correctness of this evidence upon cross-examination is slight.

As a general proposition of jurisprudence the rule should be that an excessive speed may be permitted where the object is to avoid a greater danger than involved in the speeding. Legislation based upon this theory and granting a limited discretion to magistrates and judges would be commendable.

§ 13. Breaking speed laws in cases of "necessity."

Is there any justification for breaking automobile speed laws in cases of extreme urgency? As examples of such cases we have that of a physician hastening to the bedside of a patient in a critical condition; that of a fire chief in a big city hurrying to a fire in an automobile, and that of a country automobile ambulance, which, owing to the nature of its service, must necessarily proceed with all possible haste. In all such emergency cases it is a question of the protection of either life or property that seems to warrant the violation of speed regulations. But though there may be a moral excuse for driving at an excessive rate of speed when either life or property is in danger, the automobile laws do not legally exempt anyone from complying with the speed limitations, except in a few jurisdictions, as, for instance, in New Jersey, where military motor vehicles in use for official purposes, in time of riot, insurrection or invasion, are exempt from the provisions of the law pertaining to speed. This is the only express exemption in the New Jersey act, and it is notable that physicians are not exempted from complying with the speed limit, though they are not liable to arrest when responding to an emergency call, but are compelled to give their registration number and the number of their driver's license.

From a legal standpoint there should be no exemption from the speed laws, and if we consider the subject from a moral standpoint we arrive at the same conclusion, for it is hardly justifiable to endanger life or property in an attempt to protect either. Even though a sick person may be greatly in need of immediate medical attention, the danger to which he is exposed does not warrant the greater danger that would be created on the public highways by fast driving of the physician. Again, it would be unjustifiable to create a danger to the large number of persons using the

streets in order to lessen the danger of a single person. When the present laws were enacted no doubt all possible conditions were considered, including the cases of the physician, the ambulance and the fire chief. If the Legislature deems it wise to make an exception in favor of any class of persons it has the power to do so, and law making bodies have made such exceptions in some cases; but where the law does not make any express exemption the courts have no right to accord any, and no class of persons can expect to be immune from the provisions of the law by reason of the particular circumstances of the case.

§ 14. Intention.

Intention in violating the automobile regulations is immaterial. The purpose of the restrictions is to protect the public and the acts prohibited by the automobile laws are committed at the peril of those coming within the statutory provisions. Excessively speeding, failure to register, driving without a license, lack of the required equipment, operating a motor vehicle at night between the designated hours without the required lights, all, are violations of the mandatory requirements which must be obeyed and it will be no excuse that the defendant did not know he exceeded the speed limit, or that his rear lamp or number tag had accidentally dropped off, or that he was not complying with the regulations in any other particular.

§ 15. Ignorance of the law.

"Every man is presumed to know the law" is an ancient maxim of jurisprudence, and under this maxim the automobilist is arrested, convicted and fined, no matter whether he is ignorant of the speed limit of a particular locality or not. This is right, for if ignorance could be pleaded as an excuse for violating a law, then almost every automobilist who

is brought into court for overspeeding would say that he did not know the law, or that he did not know that he was exceeding the legal speed. No fault can be found by automobile drivers because of punishment for ignorance, but when the officers of the law show an entire lack of knowledge of the statutory requirements the autoist has just cause for complaint.

If policemen who are detailed to arrest motor vehicle drivers possess no other qualification, they should at least know the speed limits set by law. How can an officer lawfully make an arrest at any time unless he knows what the rate of speed is at the particular place? Of course, where an automobile driver is caught going at a speed of from 40 to 60 miles an hour, the driver is exceeding all speed laws; but where he is traveling at a speed of from 10 to 20 miles an hour, and is arrested, it is the duty of the officer to know what he arrests the alleged offender for. If you wish to ascertain his knowledge of the speed laws, ask an officer how fast an automobile driver may go at any particular place, and compare his answer with the speed statute, and it will be safe to say that a majority of officers will be found to be unable to give a correct answer. When the law says that an automobilist may not drive over 10 miles an hour, this means that he may drive full 10 and not 9 9-10 miles per hour. Officers of the law do not seem to understand this.

Take another example. An officer in court was asked what speed limit he arrested the automobile driver for exceeding, for going faster than 10 miles an hour. He was then asked why he did not know that the speed limit at the locality was 15 miles an hour, and he positively stated that he knew that 10 miles was the maximum rate at which an automobilist is allowed to go. Of course, the case was dismissed.

Automobilists also should acquaint themselves with the speed rates of the different localities in States through or into which they drive, especially where the State law regulates speed. Where there are local speed limitations it is more difficult to do so. Many motor vehicle drivers convict themselves when brought into court by admitting that they were exceeding the speed limit. It is quite a trick that is played in police courts to induce the automobilist to admit his guilt. The charge against him, we will say, is for operating a motor vehicle at a speed of over 15 miles an hour. This is the express written accusation. The automobilist comes into court and swears that he was not driving at a rate of speed over 15 miles an hour, and very promptly the court asks him at what rate he was driving. The accused answers from 12 to 14 miles an hour. To his astonishment he is immediately found guilty and sentenced to pay a fine. He cannot understand why his case was cut so short without giving him further opportunity to be heard. The explanation is that at the particular place where he was arrested the speed limit is 10 miles an hour. The defendant did not know this. The written charge against him accused him of going over 15 miles an hour, which necessarily includes going at the rate of 10 miles per hour, but the authorities have been cute enough to draw up the charge reading "exceeding 15 miles an hour"; consequently the admission of the defendant that he was going over 10 miles an hour convicts him.[3]

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3. Speed in built up sections.—Mich. Pub. Acts 1905, p. 290, fixing the rate of speed in business and other portions of the city, was held to require the operator of an automobile to ascertain at his peril when he struck a business portion, although the business portion of a city might be in several places, and when a maximum speed was fixed by statute it was a question of fact whether the accused was within the limit. People v. Dow, Mich. 118 N. W., 745.

§ 16. Graduation of punishment.

Most of the automobile laws in this country and abroad expressly graduate the penalties for violating the law according to the offender's past record and the nature of the offense committed. If the accused has been convicted before of violating the automobile law in the particular State the penalty which may be imposed by the court is more severe, and usually a third offense authorizes a heavy fine or imprisonment, or both, in the discretion of the court. In no State of the United States has the Legislature provided imprisonment for the first offense. As a general rule the fines run from $25 to $100 in such cases. Whether the maximum fine shall be imposed is a matter entirely within the direction of the court, and there are, or at least should be, many circumstances which have more or less influence in determining the amount of the fine to be imposed in may be for the first violation of the law regulating speed, any amount from a cent to $100, or sentence may be suspended. But why is it that one automobilist is fined $35 for exceeding the speed limit and the next victim only $15 for the same offense? Is there partiality in the administration of the law? As a legal proposition the motorist who is fined to the full extent of the law for speeding has no legal complaint if another accused of a like offense is fined only $1. The amount of the fine up to the prescribed limit is discretionary. It may be asked, however, what are the facts or circumstances which should influence the amount of the fine, making it either small or large? We will consider them for a moment.

Criminal cases against automobilists have been dismissed because the defendant pleaded that the machine was so out of order that he could not keep it down, or that he was hurrying to get under cover out of the rain; and again,

that he was at the time engaged in some errand of extreme necessity.[4]

§ 17. What a conviction means.

Although many automobilists look upon being convicted of violating the speed laws as more or less a joke, nevertheless, if they fully realized the real seriousness of a criminal record against their names, possibly there would be fewer violations of the law in this respect.

To be convicted of operating an automobile faster than the law allows means that the person convicted possesses a criminal record. Of course, his record of criminal conduct does not, ordinarily speaking, stamp him as a person not fit to associate with others; nevertheless, circumstances may easily arise in the future where it would be of value to him to be able to say that he had never been convicted of any crime. For example, if he should ever be put on the witness stand to testify in a civil suit, either as a party or a witness, he may be asked if he was ever convicted of any crime. If he had ever been convicted of overspeeding, he would be compelled to answer the question under oath in the affirmative, and his reply could be used to impeach his testimony as a witness. The jury may discredit his evidence, and upon argument of counsel the conviction against him may be used. It is the ambition of every true-minded American citizen to have a clean and clear record, especially free from criminal conduct. To violate the automobile law constitutes a misdemeanor, a crime, and having been convicted of violating the law the offender has a criminal record. Crime is also ground for expulsion from office, or practice by attorneys and physicians.

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4. **Speed contests** on the public highways are illegal indictable nuisances and all participants may be prosecuted together with the promoters. Johnson v. New York, 109 N. Y. App. Div. 821, 96 N. Y. Supp. 1130, judgment reversed 186 N. Y. 139.

CHAPTER XV.

DANGEROUS AUTOMOBILE DRIVING.

§ 1. Abolishment of arbitrary speed limits.

The tendency to abolish arbitrary speed limits controlling the operation of automobiles on the public highways, as evidenced by the automobile law of the State of Connecticut, enacted in 1907, which tendency is to make "dangerous driving" the test of the propriety of the automobilist's conduct naturally leads us to ask, What is, or may constitute "dangerous driving," and by what rules or standards is "dangerous driving" to be determined?

Heretofore the authorities have relied on mathematics in judging whether an automobile driver had violated the law. Now, however, both the authorities and automobilists are to throw away the stop watch, and auto drivers are to be held criminally liable only when they conduct themselves so as to create danger to the person or property; that is, if legislation along the lines mentioned is enacted generally throughout the United States. The total abolition of arbi-

trary speed limits will never be and ought not to be accomplished.

§ 2. What is dangerous driving?

Conduct may be dangerous or not, according to the persons considering it and sitting in judgment. A woman may be afraid of a mouse, yet it is not dangerous. Walking along an electric railroad near the deadly third rail may not be dangerous to the electrical engineer employed by the road. So it may be on the public highways; conduct which is dangerous to some persons may not be dangerous to others. That which would be dangerous to an inexperienced traveler on the public thoroughfares may not be dangerous to the expert automobile driver who has been accustomed to driving through traffic and congested districts.

Dangerous automobile driving can only be determined to be such by reference to the common law as announced by the decisions of the courts. What the automobile driver should or should not do under certain circumstances can only be ascertained from decisions of the courts of America and England as to what the driver of a vehicle should or should not have done under similar circumstances, or by asking if in the particular case the driver acted as a reasonable man would act under like conditions.

§ 3. Negligent v. dangerous driving.

At the outset let it be said that dangerous driving is negligent driving, and vice versa; but dangerous driving may be something more than negligence. Negligence may be defined to be the omission of something which a reasonable man would do, or the commission of something which a reasonable man would not do; in either case causing mischief or apprehension to a third party, not *intentionally,* for

if there is an intentional wrong then it is not negligence. Intentional dangerous automobile driving is something more than neglect or the failure to exercise due care, and this is of vast importance for the automobilist to keep constantly in mind.

It would perhaps seem at first thought that an automobile could only be driven dangerously in case there are other persons besides the driver of the motor vehicle upon the highway, toward whom danger must be directed, or that there must be somebody's property subjected to danger. In other words, can there be dangerous driving unless there be either person or property subjected to hazard? Undoubtedly there may be. If, for example, an automobilist should drive through the streets of a city in a congested district at midnight, the mere fact that there are no people on the highway at the time would not make his driving lawful. The *liability* of people being there or suddenly appearing would be sufficient to make the driving dangerous, within the meaning of the law. Then, again, the question of speed might not have anything to do with the question whether automobile driving is dangerous. A person who drives an automobile carelessly, although going at a rate of speed of three miles an hour, for instance, may be guilty of dangerous driving; or, if the driver is intoxicated, the driving might be said to be dangerous *per se*. It may be that it would constitute dangerous driving for an automobile to stand absolutely still on the highway under circumstances which would require its driver, as a prudent man, to drive ahead. Such conduct would not, perhaps, come technically within the term "driving," and would be included more properly under the designation of management of the machine. However, it has been held that a person riding in a carriage may be said to be "driving" the vehicle, within the meaning of our automobile laws. (See State v. Good-

win, 82 N. E. Rep. 459.) Right here it may be suggested that it would be well if automobile legislation would use the term "management" in connection with the word "driving," so that the stopping of a machine, or leaving it on the highway so that meddlers might interfere with it, would be included.

§ 4. Criminal aspect of dangerous driving.

Shocking as the statement may seem, it is, nevertheless, the old common law that if a man drives recklessly a powerful vehicle into a crowd and kills a person, it may constitute murder, for if the person driving saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, his offense would be something more than mere manslaughter. In such a case the presumption of malice arises from the doing of a dangerous act intentionally,[1] and "there is the heart regardless of social duty." This may be said to be the most serious and atrocious aspect of "dangerous automobile driving," which may exist under very peculiar circumstances. What comes nearest to it is the conduct of an automobile driver hastening away after killing a victim without stopping to investigate the result of his act. Also engaging in racing on the public highways which results in death has a similar aspect, since killing is done while in the performance of an illegal act.

The frequency of automobile accidents causing serious injuries on the public highways during the year of 1908, calls for some action on the part of the State or municipalities, to make travel on the public highways attendant with less danger, especially concerning the automobile. Most of these accidents have occurred to pedestrians, at least

1. Hale, 476; Fost, 263; 1 Easts. Pleas of the Crown, 263; R. E. G. v. Cook; 1 L. D. Raym., 143.

those which have been of the more serious character. Nothing of good can be done, however, without an investigation into the causes of the collisions and some satisfactory conclusion reached as to which class of users of the highway is to blame.

The pedestrian class is the weakest of all others which use the public streets and thoroughfares. Those who travel in vehicles are protected to a more or less extent against actual personal contact with other objects on the public thoroughfares. Consequently, there is advantage taken of the inequality of the situation. Naturally a pedestrian will flee in order to avoid injury, no matter whether he had at the time a legal right to hold his ground. If drivers of automobiles and other vehicles fully realized the seriousness of their conduct when the right of way of the pedestrian is not respected, and if the common law would be enforced, there would be a marked decrease in the accidents which happen on the public highways.

A driver of an automobile or other vehicle is criminally responsible for injuries caused by wilfully and recklessly driving. Going back to the early common law of England and investigating the decisions, much valuable information may be derived concerning what conduct constitutes criminal driving on the public thoroughfares. We will consider a number of these English decisions for the purpose of applying the principles involved to the operation of automobiles.

There hardly can be an instance of the commission of murder by the driving of a vehicle on the public streets unless there are very extraordinary circumstances connected with it.

It is, however, laid down in Vol. I of East's Pleas of the Crime, at page 263, as follows:

"A person driving a carriage happens to kill another: If he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; for the presumption of malice arises from the doing of a dangerous act intentionally. There is the heart regardless of social duty. If he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excused."

In the same report mentioned above the following case is to be found and comment thereon:

"A was driving a cart with four horses in the highway at Whitechapel; and he being in the cart and the horses upon a trot, they threw down a woman who was going the same way with a burthen upon her head, and killed her. Holt, C. J., Tracy, J., Baron Burg, and the Recorder Level held this to be only misadventure. But, by Lord Holt, if it had been in a street where people usually pass, this had been manslaughter; but it was clearly agreed that it could not be murder.

"It must be taken for granted from this note of the case, that the accident happened in an highway *where people did not usually pass;* for, otherwise, the circumstance of the driver being in his cart, and going so much faster than is usual for carriages of that construction, savoured much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly in order to avoid any person who could not get out of the way in time. And, indeed, such conduct in a driver of such heavy carriages might under most circumstances be thought to betoken a want of due care, if any though

but few persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required; but whoever seeks to excuse himself for having unfortunately occasioned by any act of his own the death of another, ought at least to show that he took that care to avoid which persons in similar situations are most accustomed to do. Upon this supposition the death is to be referred to misadventure, which was occasioned by the head of a workman's axe flying off and killing a bystander."

The driver of a vehicle, whether it is an automobile or horse-drawn carriage, if he is guilty of inattention to his duty, may be criminally responsible for any death which his vehicle may cause at the time. For example, if he is driving an automobile while holding conversation with a companion and not looking ahead to see who might be in the highway. Under such circumstances, if he should kill a child, he would be guilty of manslaughter. (Knight's Case, Lewin's Crown Cases, Vol. I, page 168.)

Contributory negligence as a defense.—If a man undertakes to drive another in a vehicle, he is bound to exercise proper care in regard to the safety of the man under his charge; and if by culpably negligent driving he causes the death of the other, he will be guilty of manslaughter. But he cannot be found guilty of manslaughter if the deceased himself interfered in the management of the vehicle and thereby assisted in bringing about the accident. Even if the doctrine of contributory negligence applies to criminal cases, which is very much doubted, yet there is no contributory negligence on the part of any one in merely getting into a vehicle and allowing himself to be driven, although the driver is perceptibly drunk. (Reg. v. Jones, Vol. II, Cox's Criminal Cases, page 544.) This case enunciates the principle covering the criminal liability

of the chauffeur for causing the death of his employer, or any member of his family while riding.

Racing upon the public highways.—In Regina v. Swindall, Vol. II, Carrington & Kirwan's Reports, page 229, it was held as follows:

> "If each of two persons be driving a cart at a dangerous and furious speed, and they be inciting each other to drive at a dangerous and furious rate along a turnpike road, and one of the carts run over a man and killed him, each of the two persons is guilty of manslaughter, and it is no ground of defence, that the death was partly caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time.
>
> "Generally it may be laid down that, where one by his negligence, has contributed to the death of another, he is guilty of manslaughter."

In the case of Rex v. Timmins, Vol. VII., Carrington & Payne's Reports, page 499, the following was held:

> "If the driver of a carriage be racing with another carriage, and from being unable to pull up his horses in time the first mentioned carriage is upset, and the person thrown off it and killed, this is manslaughter in the driver of that carriage."

Criminal responsibility for acts of chauffeur.—Where a collision occurs on the highway and death is caused the person criminally responsible is the man actually in charge of the vehicle and whose negligence caused the accident at the time the collision took place. The man is not criminally responsible for the death of another partly caused by his negligence, where he would not have been civilly liable in an action by the suit of the party injured if the injury sustained had fallen short of causing his death. (Regina v. Birchall, Vol. IV, Foster & Finlason's Reports, page

1087.) In the case of Reg. v. Murray, V. Cox's Criminal Cases, page 509, it is held as follows:

> "If the driver of a conveyance uses all reasonable care and diligence, and an accident happens through some chance which he could not foresee or avoid, he is not to be held liable for the results of such accident.
>
> "The fact that the streets are unusually crowded from any public procession, or other cause, instead of excusing a driver when proceeding at his ordinary pace and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally answerable for any accidents ensuing from driving at a rate, and with those precautions, which he might have ordinarily observed."

§ 5. Manslaughter.

The safe automobile driver must ever keep paramount in his mind his duty in regard to human safety in order to avoid being compelled to face an accusation on one of the most serious offenses in which he may become involved. It has been stated again and again by prominent automobilists that if they stand for anything it is safety. It was only a short time ago that the president of the representative automobile club of the United States, the Automobile Club of America, stated that the one great thing which that organization stood for above all others, was *safety*, and this should be the predominating idea in the minds of all motorists while driving on the public highways.

§ 6. Instances of criminal driving.

If the driver of a vehicle might have seen the danger, but did not look before him, he may be guilty of man-

slaughter if he kills a person, because he failed to exercise circumspection. Where a driver of a cab was indicted for manslaughter, for killing a woman, and his defense was that he used due and proper care in driving the cab upon the occasion in question, it was held that the burden of proving negligence did not lie on the government, but that, upon the fact of the killing being proven, it was cast upon the prisoner to show that he used due care.[2] This is a very old English decision and it is doubtful if it is the law to-day in any of the States of this country. Owing to the fact that we have comparatively few decisions in the United States on the subject of dangerous driving on the public highways, we are compelled to turn to the English decisions which, if not always controlling, are at least instructive. Much of the law, however, as announced by the English courts, will be followed here to-day if occasion arises for its application.

§ 7. Unusual speed.

If the driver of a carriage drives it at an unusually rapid pace, and a person is killed, though the driver gives warning repeatedly to such person to get out of danger; if owing to the rapidity of the driving the person cannot get out of the way in time, but is killed, the driver is in law guilty of manslaughter. So, also, if two drivers of a vehicle drive on the highway at a furious rate of speed in a race, and one of them runs over a man and kills him, both are guilty of manslaughter, where both were urging and inciting the race, and it is no defense that the death was caused by the negligence of the deceased himself, or that he was either

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2. Reg. v. Cavendish, 2 C. & K., 230.

deaf or drunk at the time.[3] What bearing has this on automobile racing on the public highway, readily can be seen.

§ 8. Killing passenger.

Where one undertakes to drive another in a vehicle, he is compelled by law to exercise proper care for the passenger's safety. If the passenger is killed by the culpable negligence of the driver, the crime of manslaughter is committed.[4] It should be remembered that contributory negligence is no excuse to a criminal charge of driving dangerously.

§ 9. Accidental killing.

For a mere accident there is no civil or criminal responsibility. Every injury or death caused by the operation of vehicles on the public ways does not result in legal responsibility. There must be negligence or carelessness in the driving in order to render it wrongful.[5]

§ 10. Thoughtless inattention.

"Thoughtless inattention is the essence of negligence," says the Supreme Judicial Court of Maine, in passing upon the conduct of an automobilist who neglected to prevent frightening a horse with his machine. It is not so much, perhaps, what the careless driver does, as it is what he does not do, which causes injury either to himself or to another. Let us ask a few questions as to non-feasance as distinguished from misfeasance. The term "thoughtless inattention" will hereafter be a well-known one in automobile

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3. Reg. Swindall, 2 C. & K., 230; Reg. v. Timmins, 7 C. & P., 500.
4. Reg. v. Jones, 22 L. T., U. S., 217; 11 Cox., C. C., 544.
5. Reg. v. Murray, 5 Cox., C. C., 509.

driving and the use of the term by the Supreme Court of Maine was a happy thought.

Let us ask if automobile drivers—

1. Exercise reasonable care for the safety of others?

2. Assume that others will exercise reasonable care for their own safety?

3. Keep to the right of the center of the road when meeting vehicles?

4. Not overtake and pass a vehicle when it cannot safely be done?

5. Pass to the left of the preceding vehicle?

6. Turn to the right to allow others to pass?

7. Recognize the pedestrian's right to use the highway?

8. Use reasonable care to avoid injuring pedestrians?

9. Watch the road for pedestrians and vehicles?

10. Take proper steps to avert danger at its earliest appearance?

11. Look out for overtaking vehicles when stopping or slowing up.

12. Refraining from such speed as to lose control of the machine.

13. Drive at a safe speed with a view to the safety of others.

14. Maintain a safe speed at corners, so as to be able to stop the machine immediately?

15. Maintain a slower rate of speed in cities and closely built-up sections.

16. Avoid racing, unless upon a proper and suitable course under circumstances making it lawful to race.

17. Carry lights when reasonably necessary and required by law?

18. Give warning of approach under circumstances demanding it?

19. Use care in leaving the automobile in the highway?

20. Refrain, so far as possible, from frightening animals?

21. Stop the car and engine when necessary?

22. Prevent noise in the presence of a frightened animal?

The above are only a few test questions in regard to legal driving, but they are suggestive at least of what the drivers' duties consist of.

CHAPTER XVI.

DEFENDING SPEED CASES.

§ 1. In general.

When an automobile driver is arrested for violating the speed law, the first question which comes to his mind is, "How fast was I going?" He generally knows whether his car traveled faster than the legal limit, but there are some cases where it is a close question. In such cases a fair question may arise in regard to the guilt or innocence of the defendant, and there are many elements which are influential in a correct estimation of the time by the officer using a stop-watch. To defend cases of this character where there is a fair question in regard to whether the law has been violated is not an altogether hopeless task, although it must be admitted that the odds are considerably against the automobilist. There are cases of arrest where the speed laws are not violated, and such cases should on principle be vigorously defended. Many cases also come

up where the speed laws are undoubtedly violated, and to defend such is a waste of time and labor unless a very clear defense can be made or the circumstances are extremely mitigating. It is far better in these instances to plead guilty and escape with as low a fine as possible.

§ 2. Arrests.

The automobilist arrested for violating the law is taken before a magistrate or police officer, and ordinarily admitted to bail. In some sections he may have an immediate hearing, but it is advisable where a defense is to be interposed to request an adjournment and ask for a hearing at a future day, so that time may be had to communicate with counsel and prepare the defense. It is the duty of committing magistrates and officers who admit to bail, also constables and police officers who make arrests, to accord courteous treatment to those charged with violating the law. Arresting automobilists by extraordinary measures, such, for example, as stretching ropes across the road, placing obstacles on the highway, and the like is clearly illegal and subject to the criminal law. No police officer or constable has the right to do more than arrest the automobilist in the ordinary method of making arrests, which does not necessitate a physical restraint or touching of the accused, since a mere statement by the officer that the party is under arrest, and a submission to the arrest, constitute in law all that is necessary for the officer in the fulfillment of his duty. It must be borne in mind that violations of the automobile laws are not felonies but merely misdemeanors. The method of arresting an automobilist is of importance in defending the prosecution. If an arrest is made illegally, either because there was not an infraction of the law or because of the method of making the arrest, then either is at least an extenuating circumstance, which should be influ-

ential in determining the case in favor of the automobilist, especially if he is charged with merely a technical violation of the law.

§ 3. Extenuating facts in defense.

In the trial of automobile speed cases, especially in preliminary hearings, before committing magistrates, it will be found that if there is any evidence at all of a violation of law the magistrate will hold the defendant for trial, leaving the question of guilt or innocence of the accused to be determined by the court or jury which examines into the merits of the case. In fact, it is the imperative duty of binding over magistrates to hold a defendant for trial if there is any evidence of a trustworthy nature which shows that he violated the law, no matter how much contradictory evidence may be produced by the automobilist, if it does not cast substantial discredit upon the testimony of the officer. All that magistrates at preliminary hearings need to find is probable cause that the law was violated. Notwithstanding the duties of magistrates, imposed by the law upon them, there is more or less discretion, which every judge is bound to exercise in determining cases which come up before him. In the exercise of this discretion magistrates frequently dismiss charges of violating the speed laws, because, for example, a physician was hurrying to the bedside of a patient; a sick man was in the automobile, being carried to a hospital. An interesting case came before a magistrate in the City of New York, where an automobilist was arrested for violating the speed law. While under arrest and being conducted to the police station in the custody of the officer he operated the car at a slightly excessive speed. Another complaint was entered against him for violating the speed law while on his way to the station. Obviously, a case of this kind should be dismissed, since the illegal act was per-

formed while in the custody of the officer and with his implied consent, as it is not only the duty of an officer to make an arrest after the commission of a misdemeanor, but it is his duty to arrest an offender at the time of committing an illegal act, thereby preventing its consummation. The magistrate dismissed the second charge against the automobilist.

§ 4. Preparing the defense.

It is useless to go into court to defend an automobilist for violating the law without making a thorough preparation. Too many lawyers leave a case until the very last minute, and then go before the court to defend the accused, trusting to their spontaneous ability, so to speak, to trip up the police officer in his evidence and thereby gain the acquittal of the automobilist. No greater mistake could be made by any practicing attorney, for ordinarily the policeman has prepared his case in a careful manner and has anticipated possible attacks that might be made against him by the defense. The first thing that an arrested automobilist ought to do is to ascertain the precise course over which he was timed. The points or marks of this course should be determined, so that before the hearing the course can be measured by the automobilist in company with others, who can act as witnesses. An officer's word that the distance of the course is 264 feet, for example, should not be accepted without verification. The officer may or may not have measured it. Very often the policeman makes a rough guess as to the distance, especially when the automobilist is timed for the length of a block. The reasoning process of the officer is that a block, being about one-twentieth of a mile, is consequently 264 feet. It will not do to guess at the distance when an automobilist is timed over a short course, for a mistake of a few seconds, or even a fraction of

a second, may make legal the speed which appeared illegal. Always measure the course over which you were timed is the advice given to automobilists who wish to defend their cases.

§ 5. Making tests.

If an automobilist is arrested for over-speeding while traveling up grade, which oftentimes happens, a good thing to do is to test the car up the grade with a speedometer and ascertain whether it can travel at the speed charged. A test of this kind was made not long ago in a case where an automobilist was arrested for speeding up a hill, and it was found that the machine could not possibly travel over the speed limit, which was 15 miles an hour. This conclusively proved that the officer's statement that the machine traveled at the rate of 23 miles an hour was inaccurate, and the magistrate dismissed the case.

There are many other tests which should be made, such, for example, as demanding that the officer produce his stop-watch so that it can be compared with other stop-watches in order to see if it gains. In a case which the writer defended some time ago it was found that a police officer's stop-watch gained one second in every sixty. Then, again, the ability of the officer to use a stop-watch accurately should also be tested. The condition of the officer's eyesight may be very material, and he should be cross-examined in regard to his ability to see, especially when the automobile was timed from a point several hundred feet distant from where he stood.

The ordinary testimony which is given by a police officer is that he saw the automobile pass a certain mark so many feet away from him, pressed his stop-watch at that time, and when he saw the machine pass the second mark he

pressed his stop-watch again, whereupon he figured up the speed rate from the number of seconds indicated by his timepiece, which showed a speed of 25 miles an hour. Did the officer see the automobile pass the first mark of its course? If he did see it, what portion of the machine passed the mark when he first pressed the stop-watch? The front, middle or back? In nine cases out of ten the officer will swear it was either the front, middle or back of the machine which passed the mark when he pressed his watch, and that it was *exactly the front, middle or back* of the machine, not even a foot out of the way either one side or the other. Such testimony seems to be altogether too accurate for reliability and should be discredited. But it may be stated that in a large majority of the cases the police officer does not actually see the automobile pass or leave the first mark of his course.

§ 6. Identity of defendant.

It does not do to be too technical in prosecuting or defending an automobilist, nor is it well to be technically absurd in defending him; but there are certain rights which every defendant may insist upon being accorded him, such, for example, as the presumption of innocence and his right to demand that the prosecution prove its case against him beyond reasonable doubt. An accused person is not obliged to prove anything in automobile speed cases. The onus is upon the prosecution to prove beyond reasonable doubt two things:

First, that the automobile was driven at a rate of speed over the legal limit.

Second, that the person arrested is the person who committed the illegal driving.

As a general rule all that the officer saw was the machine,

the automobile itself. His eyes were glued upon the motor vehicle, and only that, as it traveled from the first point of his timing course to the second point. Especially is this the case where the automobile is timed after it passes the officer to a point beyond, in which case only the back or side of the machine is visible. In every case where an arrest is made the officer approaches the automobile and invariably arrests the man whom he finds at the wheel. The officer did not see this man violate the law, unless he had his eyes on him all the way over the timing course. The mere fact that he found a particular person at the wheel of the machine after the automobile is stopped is no presumption that the individual in question was the person who drove the machine illegally. As stated before, it must be proved not only that the automobile was driven at an illegal rate of speed, but that the person arrested did the driving. In ninety-nine cases out of one hundred the police officer cannot honestly swear that the man he arrested violated the law. He may be morally certain that he arrested the right party, but legal evidence demands correct proof of identity, especially if there are two persons seated in the front seat, which would make it almost absolutely impossible for honest testimony to be given by a police officer that he recognized, identified and singled out one of those persons as the driver who committed the illegal act. Ordinarily the policeman sees nothing but the machine itself, and from this observation he has no right to go into court and swear that he saw the defendant drive the machine.

§ 7. Arrests at night.

The accuracy of timing automobiles is reduced at night time, especially if it is very dark along the highway. It is a very difficult task to see when an automobile passes a cer-

tain mark a considerable distance away, and the chances of mistake are so great that the court should look with caution upon stop-watch evidence of this character. Then, again, the lights which the machine ordinarily carries are apt to confuse the timer, since it is impossible to see anything except them.

§ 8. Bicycle policemen.

For a police officer to arrest an automobilist and go before a magistrate testifying that he caught and arrested the defendant while the latter was traveling at the rate of 25 to 30 miles an hour on an up grade is in itself suspicious. There are many cases of this kind, however, and oftentimes it is very easy to lead a police officer into inconsistent statements in regard to the speed of the automobile and his bicycle. What was the gear of the bicycle? What was the grade of the highway? What has been the officer's experience in bicycle riding? These are all questions of importance in testing the accuracy of the statements of the bicycle policemen. There have been tests made to determine how fast the police officer could ride bicycles, and it was found that a few could with considerable effort propel their wheels on a level grade at a rate of 25 miles an hour for a short distance. It takes, however, a pretty good man to do this, and when a policeman testifies that he caught an automobilist traveling at that rate of speed he is treading upon very delicate ground.

§ 9. Points in defending speed cases.

Probably no case presents a more difficult task to the lawyer than the prosecution of an automobile driver for violating a speed law. Ordinarily, the advice given to a

defendant accused of speeding is to plead guilty and accept the punishment of the court, whatever it may be. Where there is a probability of the infliction of merely a fine, then the consequences are not very serious, but where the offense is a second or a third, and imprisonment may be the punishment therefor, then the automobile driver has a serious proposition staring him in the face, which is usually a possibility at least of going to jail for a few days, or weeks. Imprisonment has rarely been resorted to, however, in the United States for punishing automobile drivers, and the instances of physical incarceration for speeding are few and far between. Notwithstanding the accepted punishment, it is a thing not to be relished, to have a criminal conviction placed against the citizen's name. Therefore it is that many automobilists, who believe that they have acted legally, desire to prevent a conviction against them wherever it is possible under the circumstances.

There are to-day three methods of timing automobiles, namely, by the use of a stop-watch, the speedometer, and opinion evidence as to speed, given by eye-witnesses who may be either trained or untrained in the calculation of the velocity of moving objects. Speed alone is an intangible thing, the estimation of which results in a methematical calculation. It is necessarily composed of time and distance, and is relative to either a stationary object or point, or an object or point which is moving. The latter case occurs when an automobile is being timed by a person who is also moving along the highway, such, for example, as an officer on a bicycle, or motor cycle, or in an automobile. At the outset it should be understood that no person can be convicted of a criminal offense, unless it is upon the sworn testimony of a witness who saw the act committed. In the case of an automobile violating the speed law, the witness, if we are to follow the requirements of law, must be able

to testify under oath that he saw the automobile travel, that he saw the defendant cause the automobile to travel, both of which over a certain designated and measured space within a certain measured lapse of time. As suggested, there are quite a number of elements in the offense of speeding an automobile which are to be established in order to convict a driver.

First and foremost, where a stop-watch is used to time an automobile, a measured distance along the highway must have been measured accurately. This distance must have been measured by the person testifying in the witness chair and who swears as to the speed. It will not do for another person to have measured the course and who told the officer that it was a certain number of feet or yards. If the officer testifies that the speed of an automobile exceeded a certain rate according to his stop-watch, and he bases his estimation on the distance which the automobile traveled within the time, but he merely knew the distance from the say-so of some other person who measured it, this testimony is incompetent. It constitutes hearsay, which is never permitted in courts of law. So, one of the first things for an automobilist to do is to see that no hearsay evidence is introduced against him to accomplish his conviction.

The measurement of the course must be methodically accurate. Any old yard-stick or tape-measure will not do. The units of measurement must be such as are prescribed by law and according to the standards usually kept by the state. For an officer to testify to the fact that he measured a certain distance along the highway with a measure does not constitute accurate measure of the distance of the course, unless it is shown that the measure used was accurate. He may state that he measured a course with a certain kind of a measure.

§ 10. Illegal police methods.

Notwithstanding the fact that the law is violated frequently by automobilists, there is no excuse for illegal depredations upon personal security and private property on the part of police officials who arrest persons for violating the speed limits. The use of ropes stretched across the public highways, the erection of hummocks and other obstructions in the path of travel, and the display of firearms on the part of the policemen and constables are unauthorized, unless there are extremely aggravating circumstances connected with an arrest. General obstructions placed on the road are never sanctioned under any circumstances connected with automobiling.

No more force can be used by an officer of the law in arresting a person who has committed a misdemeanor than is absolutely necessary for making the arrest. This legal requirement should be known and understood by every peace officer. Physical violence is prohibited, and the use of dangerous weapons renders a police officer liable for assault, if it is unauthorized. It must be borne in mind that violators of the automobile laws are guilty of misdemeanors merely, and are not to be dealt with harshly, especially where violations are only technical. Most automobilists are respectable, law abiding citizens, generally speaking, and are persons of business standing and integrity. Ignorant officials have no right to violate the personal security of these citizens, and if they do they should be taught a lesson in respecting personal rights.

For example, if an automobilist is arrested and he submits to arrest, indicating no disposition to escape, there is absolutely no warrant for poking a pistol in his face and threatening him with being filled with lead. Of course, if one who is arrested atempts to get away or escapes from an officer, then force may be employed to capture the of-

fender. But if too much force is used the officer makes himself guilty of illegal conduct.

§ 11. On stop-watch testimony.

There is no doubt that the stop-watch is an accurate instrument for estimating speed, provided the watch is correctly used and is in good order, but where the speed indicator of an automobile and the stop-watch of an officer conflict, assuming that both instruments are accurate in themselves, it seems that the speed indicator should control the case, since it is purely mechanical and involves no judgment.

Frequently the police officer times the automobile by means of a stop-watch between two points situated a certain distance apart while he is standing at the side of the street, with his line of vision not at right angles to the course of the highway, but diagonal. The officer sees the automobile coming almost directly toward him. If he is honest, we will say he started his stop-watch when he *thought* the automobile was directly opposite the first mark on the course. The officer observes the machine until it arrives at a place directly opposite the second mark and then he stops his watch. Upon reading the number of seconds taken to cover the course, he is prepared to testify in court that the automobile was going 25 miles an hour. Is his testimony reliable, considering the method of estimating the time and the lines of vision?

That the line of vision is important in estimating the time of a passing object is undoubted. If the officer's line of vision is not at right angles to the roadway at the point where the car is timed, he cannot tell accurately the moment at which it passes this point. It must be borne in mind that the time of the machine is taken over a very short

distance, and a slight mistake may make a legal speed appear illegal, and vice versa. It is now almost impossible to get the courts to recognize the liability of mistakes due to imperfect vision of the timer, but the time will soon come when there will be controlling rulings made concerning unreliable stop-watch evidence.

To satisfy his own curiosity in regard to the accuracy of time estimation with a diagonal line of vision, the writer made a series of experiments in which he was assisted by several others. Two stop-watches and a speed indicator in perfect working order were used. The result was as follows: When timing the automobile it was found that the stop-watch time was always less than the time found by those in the car with stop-watches and the speed indicator. The experiment was tried again and again, and the time taken from the position shown was without exception less than that obtained by those in the car. This raised the question whether, when observing a moving vehicle from a point in front, it may not be the case that the human eye fails to see it as directly opposite the first mark until it is a considerable distance beyond. It is obvious that if such a defect of vision exists the actual time of the machine is taken over a course much shorter than the measured course, which would make the estimated speed much greater than the actual.

Further experiments may produce some method of conclusively disproving inaccurate testimony of an officer, but as the matter now stands it is completely within the officer's power to convict the automobilist, and there is no way to break down inaccurate stop-watch evidence, unless the defendant introduces testimony based upon the use of an accurate speed recording instrument. Where the correctness of evidence depends upon human judgment, an erroneous conclusion is apt to be reached. The speed indicator,

to be of weight in a court of law in refuting the testimony of the stop-watch, must automatically register the maximum speed attained.[1]

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1. **Taking illegal fees from automobilist.**—See Templeton v Williams, 24 Mont. L. Rep. (Pa.) 192.

Jurisdiction of New York Courts.—People v. De Groff, 56 Misc. Rep. 429.

CHAPTER XVII.

THE GARAGE AND GARAGE KEEPER.

§ 1. Garage defined.

The garage has been defined as the modern substitute for the ancient livery stable,[1]

§ 2. Garage not a nuisance.

It has been held that a garage does not constitute a public nuisance. An automobile station or garage constructed on land abutting on a boulevard does not constitute a common-law nuisance. Mr. Justice Woodward, of the Appellate Division of the Supreme Court of *New York,* declared that the business of a garage keeper "appears perfectly lawful and legitimate." [2]

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1. Smith v. O'Brien, 46 N. Y. Misc. Rep. 325, 94 N. Y. Supp. 673.

2. Stein v. Lyon, 91 N. Y. App. Div. 593; Diocese of Trenton v. Toman, 70 Atl. Rep. 606.

Business of garage is offensive. —An owner of land divided it into building lots, and in each deed inserted a restriction that the property should not be used for any business "offensive to the neighborhood for dwelling houses." In a suit by one of the grantees

§ 3. Status of garage keeper.

One who receives the property of another for the purpose of taking care of it is, in law, termed a "bailee." The keeper of a garage is a bailee for hire. With him is deposited personal property—the automobile—for safe keeping, for which he is paid a consideration. The legal relation established between the owner of the automobile and the keeper is that of bailor and bailee. The relation is a well-established one in the law, and from it flow many important rights and responsibilities.

§ 4. Garage keeper's rights.

Of the garage keeper's rights there have been some interesting questions raised in recent litigation. Of course, he is entitled to receive from the owner of the automobile the agreed price for storage. But has the keeper any way of enforcing his right to compensation other than a right of action which may be had for any breach of contract, such, for example, as retaining possession of the automo-

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to restrain the erection of an automobile garage, it appeared that the building was designed to accommodate about 125 large automobiles, a part of one story being designed for a repair shop, and it being intended to place in the building a portable forge; that demonstration cars were to be kept, with demonstrators to run them, and that about seventy-five or a hundred customers were expected to store automobiles there, such machines to go in and out on an average of once a day. The Supreme Judicial Court of Massachusetts held that the maintenance of such a building would constitute a violation of the restriction against carrying on offensive business. See Evans v. Foss, 80 N. E. Rep. 587.

Injunction against garage keeper.—The owner of an automobile garage, licensed to store one barrel of gasoline in the building, which is a frame building and adjacent to other frame buildings, will be enjoined from introducing gasoline into tanks of the automobile inside the building, and restrained from storing automobiles with gasoline in the tanks inside the building. O'Hara v. Nelson, 63 Atl. Rep., 836.

bile under the claim of a lien? This is the question which was raised in a case in *New York* (Smith v. O'Brien, 46 N. Y. Misc. Rep. 325, 94 N. Y. Supp. 673), wherein it was decided that where an automobile is kept at a garage, but which is used by the owner so that the garage keeper's possession is not continuous, but is broken by the owner using the automobile at pleasure, the keeper has no lien for his charges, and cannot retain the possession of the machine to enforce payment. Under similar facts, this decision would probably be followed in other states where the common-law doctrines are administered, since no lien can be had by any bailee where the bailee does not have and control the possession of the property delivered to his care. A surrender of possession surrenders the right to a lien. The credit, in such a case, is supposed to have been furnished on the bailor's personal responsibility only, and no recourse against the property bailed is supposed to have been contemplated. Where, however, continued unbroken possession is had by the garage keeper he is, like the warehouseman and wharfinger, under the common law and the various statutory provisions of the states, entitled to retain the property for his charges. Independently of a statutory provision giving a lien, if the garage keeper wishes to secure a lien where the machine is used by the owner, he should stipulate for the right to retain possession of the automobile in case of non-payment of charges. The lien law of *New York* has recently been amended so as to give a garage keeper a lien for storage, supplies, and work and labor. See also Gage v. Callanan, 113 N. Y. S. 227.

§ 5. Liabilities of garage keeper.

From the definition of a garage one would naturally suppose that the garage keeper's status would be similar

to that of the keeper of a livery stable, and that the rights and liabilities of both these parties would, in many respects, be similar. Such a supposition is, independently of statute, substantially correct. The liabilities of the garage keeper depend upon his care of the automobile while it is in his custody. He is bound to exercise reasonable care and prudence in keeping the machine in a safe manner, and must furnish reasonably safe accommodations. Any damage caused to the machine while in his custody, resulting from the lack of reasonable diligence and care, renders the garage keeper liable for whatever injuries the machine may have sustained. The failure to exercise due care constitutes a breach of the contract of bailment.

§ 6. Keeping and selling gasolene.

The commissioners of the *District of Columbia* had the power, under the authority of the Act of Congress of January 26, 1887, to make and enforce a regulation requiring a license for the storage of gasolene in the city of Washington. That portion of section 3 of the regulations promulgated by the commissioners of the District of Columbia, under the authority of the Act of Congress of January 26, 1887, requiring every person storing gasolene in the city of Washington to take out a license which requires every such application to be referred to the inspectors of buildings and the chief engineer of the fire department for examination of the building described in the application, who shall transmit the application with the recommendation to the assessor of the district, who shall, if such officials recommend, issue a license unless otherwise ordered by the commissioners, is not void as an unauthorized delegation of the powers conferred upon the commissioners; it not

being a delegation of their authority to commit to the expert agents named, a duty to ascertain and report information important to the exercise of their power to issue the license, the propriety of which issue must depend upon the character and surroundings of the building occupied. The word " recommendation " in the regulation is used in the sense of report.[3] Section 3 of article 3 of the police regulations of the District of Columbia prohibiting the storage or keeping for sale of inflammable oils, etc., without license, and prescribing the conditions under which such license shall be granted, was held to be valid in Cahill v. District of Columbia, 23 Wash. L. Rep. 759, wherein it was also held that the evidence in a prosecution in the police court upon an information charging the plaintiffs in error, proprietors of an automobile garage, with having in store and keeping for sale gasolene, without having first obtained a license, was sufficient to support a finding that defendants were guilty, and judgment was affirmed. An information in the police court against the proprietor of an automobile storage and repair house, charging him with storage and keeping gasolene for sale without a license, is not supported by evidence which shows that the defendant had a license to conduct such a business but had been refused a special license for the storage and sale of gasolene on the premises; that he did not have a permit to store gasolene in an underground tank half a block from his establishment; that from time to time each day as needed he procured gasolene from such tank for the supply of automobiles in his establishment, which remained therein from ten minutes to an hour awaiting the arrival of their owners, who had ordered them

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3. District of Columbia v. Weston, 23 App. Div. (D. C.) 363, *distinguishing* United States v. Ross, 5 App. Cas. (D. C.) 241.

made ready for use; there being nothing in such evidence from which the sale of gasolene could be inferred and nothing to show that it was stored upon the premises within the meaning of the regulation.[4]

§ 7. Liability for articles stolen.

An important decision has just been handed down by the Municipal Court of the City of New York which holds that the proprietor of an automobile garage is liable for property stolen from a locker. The facts in this case are as follows: The proprietor of an automobile garage sued an automobile owner for certain storage charges and materials furnished. The automobile owner filed a counter claim as a defense for $250, the amount he claimed he was damaged because of the loss of a silk rug which his chauffeur placed in the locker which was in the garage. Judge Lauer, in deciding that the garage keeper was liable for the loss of the rug, in his opinion says: "While it is true that no case precisely similar to the one which I am now called upon to decide has been brought to my attention, nevertheless the application of established principles of law renders the decision of the present case without serious difficulty. The garage is the modern substitute for the ancient livery stable (Smith v. O'Brien, 46 Misc. 325, aff'd 103 A. D. 596) There can be no doubt that the relation between the plaintiff and the defendant in regard to the robe was that of bailor and bailee. The defendant intrusted to the plaintiff the care of his automobile and necessary accoutrement, for which the plaintiff agreed to care, and for which he received from the defendant a certain

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4. Weston v. District of Columbia, 23 App. Cas. (D. C.) 367.

compensation. The plaintiff supplied to the defendant a locker, the locker being in the nature of a closet with a lock attached, and supplied to the defendant's chauffeur a key for the same. * * * Under such circumstances, would the proprietor of the garage be considered a bailee for hire in regard to the storage of the robe or merely a gratuitous bailee upon the theory that the charge made by the plaintiff as proprietor of the garage was for the storage of the car, the storage of the robe being an incident thereto and given free? He would be liable to the defendant in either event, for a bailee who delivers goods left in his charge to the wrong party, or who, after such goods are demanded of him, does not in any way account for their loss, is liable to the true owner for their value (McKillop v. Reich, 76 A. D. 334, 335; Coykendall v. Eaton, 55 Barber, 188). * * * I am therefore led to the conclusion that the plaintiff failed in the duty which he owed to the defendant to properly care for the defendant's property (Claflin v. Meyer, 75 N. Y. 250, 262; Stewart v. Stone, 127 N. Y. 500, 506; Rothser v. Cosel, 39 Misc. 337). It cannot properly be argued that the property was not in the possession of the plaintiff because placed in a locker to which the defendant was supplied with a key, because in the case of Jones v. Morgan (90 N. Y. 4, 9) the defendant was held liable, as a bailee, of furniture stored in a separate room to which the plaintiff was supplied a key. Thus it has also been held in the case of the proprietor of a Turkish bath establishment that he was responsible for the loss of clothing stolen from a room assigned to a customer. In such a case the room was considered to be in the proprietor's keeping (Bird v. Everard, 4 Misc. 104)."

§ 8. Repairs.

An important decision concerning the repairing of an automobile, rendered by the Municipal Court of New York City, is as follows:

LAUER, J.—This action is brought to recover the sum of $267.12, representing three items, first, the item of $160, the agreed price of certain repairs to defendant's electric automobile; secondly, the price of $78.12, the cost, as per agreement of the parties, of placing in the defendant's automobile a new armature; and thirdly, the item of $29, representing certain work, labor and services performed by the plaintiff upon the same automobile at the defendant's request.

I find great difficulty in reaching a decision in this case, realizing that if I decide the issues in favor of the defendant the plaintiff must suffer a considerable loss, in view of the fact that it has expended time and money in the repairs which it undertook to make upon this automobile. But, on the other hand, if I decide in plaintiff's favor, the defendant would be put to great expense with comparatively little, if any, gain by reason of the work which the plaintiff undertook.

I think it may fairly be said that it was the understanding between the parties that by reason of the repairs which the plaintiff undertook to do the automobile of the defendant was to be put in first class running condition, or at least in good running condition. As I understand it, this does not necessarily mean that it should be put in perfect mechanical condition. The question is, however, can it fairly be said that this automobile was by reason of the repairs which the plaintiff made put in good running condition? Admittedly, while the automobile was in the possession of the plaintiff, the only test of its running qualities was made about the garage floor. Besides this the automobile was operated only

from the garage to the pier in New York and from the pier to the garage in Huntington, a distance of but a few miles, over good roads, and after that the car could not be, and was not, operated satisfactorily. It is undisputed that when the attempt was made to recharge the batteries, which had in part been exhausted by the trip to Huntington, it was found that there was an interrupted circuit in the shape of the breaking of certain metal straps connecting the cells of the batteries. While this in itself may not have been a matter of very great importance, and a repair which could be made, it indicates to my mind that the work was not done in that workmanlike manner which the defendant had a right to expect. I take it that a car is not put in first class or in good running condition merely because it happens to run a rew miles. There must be at least some reasonable period of time when, with fair and reasonable usage, under ordinary conditions, the car should continue to be capable of operation. In this instance such was not the case. I do not mean to decide that the party undertaking repairs of an automobile guarantees the duration of those repairs, but where, as here, without any hard usage, and with only a few miles of operation, the car is found unfit for further operation, I do not think it can be said that the plaintiff has reasonably complied with its contract to put the car in first class or even in good running condition. So far, therefore, as the item of $160, the contract work, is concerned, I have concluded that the plaintiff must fail in its recovery. In regard to the items representing the labor of the plaintiff's employees in attempting to make the repairs in Huntington I do not think the plaintiff is entitled to recover, for they were mere attempts to remedy the defective condition of the car. So far as the price of the armature is concerned I believe that it is but fair to permit the plaintiff to recover for the cost thereof, as this armature was purchased

by the plaintiff for the defendant, at the defendant's request, and was put into the defendant's car, and the defendant undoubtedly received the benefit thereof.

It follows from these expressions of my opinion that judgment must be for the plaintiff in the sum of $78.12. See *New York Law Journal,* Dec. 4. 1908.

CHAPTER XVIII.

THE HIRE OF AUTOMOBILES.

§ 1. General considerations.

The hiring of an automobile from the owner creates in law a form of bailment known as *locatio rei.* Where the owner of personal property lets it to another party, who is to pay for the use of it, the contract is for their mutual benefit, which fact is important in determining the rights and liabilities of the parties.[1]

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1. Parsons on Contracts, vol. 2., (9th ed.) 134.

According to the foreign and Roman law, the letter, in virtue of the contract, impliedly engages to allow to the hirer the full use and enjoyment of the thing hired, and to fulfil all his own engagements and trusts in respect to it, according to the original intention of the parties: "*Præstræ, frui licere, uti licere.*" This implies an obligation to deliver the thing to the hirer; to refrain from every obstruction to the use of it by the hirer during the period of the bailment;

§ 2. Ordinary care of hirer.

A party who hires an automobile from another is bound only to take ordinary care of the machine and is not responsible for damage inflicted to the automobile if ordinary prudence has been exercised while the machine was in his custody as a bailee.[2]

The degree of care, of course, which the hirer of an automobile should exercise would depend upon all the facts and circumstances of the case, but still it is only ordinary care as the law defines this term which is necessary to be exercised. The hirer is bound to render such care in the case as the owner has a right to expect that a man of ordinary capacity and caution would take of the automobile, if it were his own under the same circumstances.[3]

§ 3. Liability for servant's acts.

Where an automobile is hired, the bailee, the hirer, is responsible for the negligence of his servant the chauffeur, provided that the negligence took place when the chauffeur was in the discharge of his duty, or obeying the commands or instructions of the master, the owner, express or implied.[4]

When not acting within the authority of the employment, the owner would not be responsible for an injury to the

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to do no act which shall deprive the hirer of the thing; to warrant the title and right of possession to the hirer, in order to enable him to use the thing, or to perform the service; to keep the thing in suitable order and repair for the purposes of the bailment; and, finally, to warrant the thing free from any fault, inconsistent with the proper use or enjoyment of it. These are the main obligations deduced by Pothier from the nature of contract; and they seem generally founded in unexceptionable reasoning. Story on Bailments, p. 317.

2. Parsons on Contracts, vol. II., (9th ed.) 134, 135.

3. Parsons on Contracts, vol. II., (9th ed.) 135.

4. Parsons on Contracts, vol. II., (9th ed.) 136.

automobile committed by the chauffeur as a result of his own willful malice, in which the master took no part.[5]

§ 4. Unlawful acts committed by third parties.

If an automobile is lost through theft, or is injured as a result of violence, the hirer is only answerable when imprudence or negligence caused or facilitated the injurious act.[6] However, where an automobile which is hired out is lost or injured, the hirer is bound to account for such loss or injury. When this is done, the proof of negligence or want of due care is thrown upon the bailor, and the hirer is not bound to prove affirmatively that he used reasonable care.[7]

§ 5. Unlawful sale by hirer.

If the hirer of an automobile should sell it without authority to a third party the owner or bailor may institute an action of trover against even a *bona fide* purchaser, one who purchases the machine innocently believing that the hirer had the title and power to sell.[8]

§ 6. Duties and rights of owner.

The owner of the automobile, or the party letting it out, is obliged to deliver the automobile hired in a condition to be used as contemplated by the parties; nor may the owner interfere with the hirer's use of the automobile while the hirer's interest is in it, or right in it continues. Even if the hirer abuses the automobile, although the owner may then, as it is said, repossess himself of his property, if he can do so peaceably, he may not do so forcibly, but must

5. Parsons on Contracts, vol. II., (9th ed.) 137.
6. Parsons on Contracts, vol II., (9th ed.) 138.
7. Parsons on Contracts, vol. II., (9th ed.) 138.
8. Parsons on Contracts, vol. II., (9th ed.) 138.

bring an action. If such misuse of the automobile terminates the original contract of bailment the owner may demand the automobile, and, on refusal, bring trover; or, in some cases, he may bring the action of trover without demand.[9]

§ 7. Keeping in repair.

The owner of an automobile who lets it out for a term should keep the vehicle in good order, that is, in proper condition for use; and if expenses are incurred by the hirer for this purpose the owner must repay them. There is some uncertainty on this point, however. The true principle would seem to be that the owner is not bound (unless by special agreement, express or implied by the particular circumstances) to make such repairs as are made necessary by the natural wear and tear of the automobile in using, or by such accidents as are to be expected, but is bound to provide that the automobile be in good condition to last during the time for which it is hired, if that can be done by reasonable care, and afterwards is liable only for such repairs as are made necessary by unexpected causes.[10]

§ 8. Rights of hirer.

By the contract of hire, the hirer of the automobile acquires a qualified property in it which he may maintain against all persons except the owner, and against him as far as the terms and conditions of the contract, express or implied, may warrant. During the time for which the hirer is entitled to the use of the automobile, the owner is not only bound not to disturb him in that use, but if the hirer

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9. Parsons on Contracts, vol. II., (9th ed.) 139, 140.
10. Parsons on Contracts, vol. II., (9th ed.) 140, 141.

returns it to the owner for a temporary purpose, he is bound to return it to the hirer.[11]

§ 9. Duties of hirer.

There is an implied obligation on the part of the hirer to use the automobile only for the purpose and in the manner for which it was hired. If the automobile is used in a different way, or for a longer time, the hirer may be responsible for a loss thence accruing, although by inevitable casualty. In general the hirer must not abuse the automobile, but where during misuser the machine is lost, it seems that trover would not lie, unless the owner can show that the loss was caused by misuser.[12]

§ 10. Termination of hiring.

The contract for the hire of an automobile may be terminated by the expiration of the time for which the vehicle was hired, or by the act of either party within a reasonable time, if no time is fixed by the contract, as by the agreement of both parties at any time; or by operation of law if, for instance, the hirer becomes the owner of the automobile, or by the destruction of the automobile. If it is destroyed without the fault of either party, before any use of it by the hirer, he has nothing to pay; if after some use, it may be doubted how far the aversion of the law of apportionment would prevent the owner from recovering *pro tanto;* probably, however, where the nature of the case admitted a distinct and just apportionment, it would be applied. Either party being in fault would, of course, be amenable to the other. The contract might wisely provide for such a con-

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11. Parsons on Contracts, vol, II., (9th ed.) 142.
12. Parsons on Contracts, vol. II., (9th ed.) 141, 142.

tingency as the destruction of the automobile in such manner.[13]

§ 11. Surrender and return of automobile.

The hirer of an automobile must surrender the machine at the appointed time, and if no time is specified in the contract, then whenever called upon after a reasonable time, and what constitutes a reasonable time is to be determined by all the facts and circumstances of each particular case.[14]

§ 12. Compensation for hire.

The party letting an automobile for hire acquires an absolute right to, and property in, the compensation due for the vehicle hired; and the compensation or price, when not fixed by the parties, must be a reasonable price, to be determined by the circumstances. Of course, where a definite sum is stipulated, the sum agreed upon controls.[15]

§ 13. Deviation from agreed route.

In Deming v. Johnson, in the Supreme Court of Errors of *Connecticut* (April, 1908, 69 Atl., 347), which was an action against a livery stable keeper for injuries to one who had hired a team from him, due to the insufficiency of the harness, there was evidence showing that plaintiff, with knowledge that the horse was easily frightened by automobiles, had driven it about ten miles beyond the destination agreed upon, the road to which was seldom traveled by automobiles, and while being driven upon a road much frequented by automobiles the horse was frightened by a passing automobile, which was the cause of the accident by

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13. Parsons on Contracts, vol. II., (9th ed.) 143.
14. Parsons on Contracts, vol. II., (9th ed.) 142.
15. Parsons on Contracts, vol. II., (9th ed.) 143.

which plaintiff was injured. It is a criminal offense in Connecticut for any person hiring a horse willfully to make any false statement relative to the time, place or manner of using it, with intent to defraud any person. The court charged that the mere fact that plaintiff hired the team to go to a certain destination and drove beyond that point to the place of the accident would not prevent a recovery, unless it contributed to the injury, in which case the verdict should be for defendant. This was proper to charge that, if the team was easily frightened by proximity to automobiles, and plaintiff knew of this, and yet drove on a road not contemplated in the hiring, and more traveled by automobiles than the one contemplated, and if plaintiff by driving on such road came in proximity to an automobile, and such proximity so brought about contributed to the accident, the verdict should be for defendant. The court said in part:

"It is true that the plaintiffs were not barred of redress merely because they had violated the terms of a contract or the provisions of a statute. The violation of the statute or of the contract of hiring by driving upon a different road from that named in the agreement of hiring was a material fact only as it constituted a breach of a duty which the plaintiffs owed the defendants respecting the prevention or avoidance of such an accident as that that happened (Monroe v. Hartford St. R'y, 76 Conn., 201-206, 56 Atl., 498). If, therefore, driving upon the road where the accident happened instead of upon that named in the contract of hiring, could not have contributed to cause the accident, it was a fact of no consequence in the case. But in the rescription in the complaint of the manner in which the accident happened it is alleged as a material fact that the horse became frightened at a passing automobile. Obviously the defendants' alleged negligent act, as stated in the complaint, was their failure to furnish the plaintiffs with reins which would not break

when the driver was in a proper manner attempting to control the horse when frightened. If the plaintiffs' act of so driving upon a different road from that specified in the contract of hiring was the cause of the coming in proximity to an automobile, it follows that that act could have contributed to cause the accident. Whether the plaintiffs were driving upon a different road than that for which the team had been let to them, and, if so, whether that fact was the cause of their coming in proximity to an automobile, and whether the proximity to the automobile contributed to cause the accident, were all questions of fact which the court in the statement complained of properly submitted to the jury. The question was not one of contributory negligence, but whether the plaintiff's wrongful act in driving upon a different road in violation of the contract of hiring contributed to cause the injury, although in respect to barring a recovery by the plaintiffs there is no material distinction between such a wrongful act and contributory negligence. (Broschart v. Tuttle, 59 Conn., 1-20, 21 Atl. 925, 11 L. R. A., 33. See Palmer v. Mays, 80 Conn., 353, 68 Atl., 369)."

CHAPTER XIX.

THE CHAUFFEUR.

§ 1. Chauffeur defined.

The term chauffeur means one who manages the running of an automobile.[1] The term in legal significance may be

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1. Web. Int. Dict., Supp., p. 39.

The chauffeur is engaged in manual labor.—Smith v. Associated Omnibus Co. Div. Ct. 916.

Probably the best definition of the term chauffeur is that the word designates a person who habitually and as an occupation drives a motor vehicle commonly called an automobile, for hire generally, or for a master or employer who engages the services of the employee at regular wages. A person who owns an automobile and carries on a hacking business personally operating the machine, although he drives "for hire" and may be said to be a chauffeur, nevertheless, he is not a "chauffeur" within the meaning of many automobile enactments and does not come within commonly accepted understanding of the word. The automobile law of the Province of Quebec defines the word "chauffeur" as meaning a person skilled in operating motor vehicles who habitually drives such vehicles as a means of livelihood. See Sec. 1, Subd. 2, of the Motor Vehicle Law of Quebec, 1906. This is a most excellent definition.

In Missouri the automobile law uses the term "Auto driver" to designate the chauffeur. The statute provides as follows: "Auto

said to mean any person operating a motor vehicle, as a mechanic, employee, or for hire. This is the definition of the term contained in the *New York* Motor Car Act of 1903, and is substantially the same in some other jurisdictions.

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driver" shall be construed to mean any person operating a motor vehicle as mechanic, paid employee, or for hire.

See Sec. 1, of the Missouri Motor Vehicle Law.

In New York, as is the case in several of the States, the term is expressly defined by the motor vehicle law as meaning any person operating a motor vehicle as a mechanic, employee or for hire.

See Sec. 1, Subd. 2, (5) of the Motor Vehicle Law of New York, 1904.

Legal result of definition of term.—All persons coming within the definitions of the term "chauffeur," as provided in the various automobile enactments, are subject to the regulations intended to govern chauffeurs. Conversely, all persons who do not come within the definition are exempt from those provisions of law intended to govern that class of individuals. The importance of the term including every person intended and who should be regulated as a chauffeur, and excluding every individual who should not be so regulated, is apparent. Take for example, the New York Motor Vehicle Law of 1904, which has been copied extensively by automobile legislation throughout the United States. Three classes of persons are required to register with the Secretary of State: namely, owners, chauffeurs, manufacturers and dealers. If a person does not belong to either one of these classes of individuals, he is not subject to the regulations. A person may be neither a owner nor a chauffeur under the 1904 New York law, in which case he is at liberty to drive a hired or borrowed automobile without a license. This is a defect in laws similar to the one mentioned and should be remedied. The true purpose of regulations controlling the chauffeur, is to regulate all automobile drivers who are not otherwise permitted by license to drive an automobile. Some of the State laws compel owners to obtain a driver's license before they can operate a motor vehicle which has been registered. Other State laws permit the owner to drive his automobile upon registration of the machine with the proper office. It will be seen that the term "chauffeur" should be as comprehensive in its meaning as is intended by the law.

All chauffeurs are necessarily automobile drivers, but all automobile drivers are not chauffeurs.

§ 2. Origin of term.

A chauffeur was a member of the bands of outlaws, during the reign of terror in France, who roamed over the northeastern part of the country under the lead of John the Skinner, or Schinderhaunes. They garroted men and women, and roasted their feet to compel them to disclose hidden treasure. In 1803 rigorous measures were taken which resulted in their suppression. With the increasing use of the automobile as a means of recreation and transportation, the term chauffeur was applied to the driver who operated the carriage and the mechanic who was carried to look after the machinery and fuel. The origin of this use of the term is found in France, where automobiling first found favor as a sport, the word chauffeur being there employed to designate a fireman or stoker.[2]

§ 3. Chauffeur's status.

The legal status, duties, and responsibilities of the chauffeur or operator of a motor car are of vital interest, not only to the motorist, but to all. You who employ chauffeurs, by reason of employment, have interest at stake. Those who are employed as chauffeurs have not only serious responsibilities of a personal nature, but are, to a great extent, the guardians of their employer's interests. The chauffeur or operator of an automobile occupies towards his employer and the public a serious position, one which compares favorably in the necessity for prudence, diligence, and intelligence with that of the railroad engineer or master of a ship.

§ 4. Liability of master for chauffeur's acts—in general.

A chauffeur under employment is, in law, a servant, and the relation existing between the employer and em-

2. The New International Encyclopedia, vol. IV., p. 427.

ployed is that of master and servant. From this relation many rights and liabilities flow. The general rule that the master is liable for the wrongful injurious acts of the servant or employee, committed in the course of his employment, applies in the operation of an automobile by one for hire. If a chauffeur negligently, while about his employer's business, runs down a pedestrian, who is in the exercise of due care, the employer is liable in damages and so is the chauffeur. But the relation of master and servant must exist at the time in order to charge the master.[3] See Chapter XX.

§ 5. Chauffeur acting contrary to authority.

Where a chauffeur uses his employer's automobile for his own personal pleasure and contrary to authority, a party negligently injured by the car cannot hold the employer liable, since the operator of the vehicle was not, at the time, acting for his employer and within the scope of his employment; however, the chauffeur is liable in damages. Thus, it has been held in *New York* that an absent owner of an automobile was not liable for the negligence of the chauffeur committed at a time when he was not engaged in the owner's business.[4] But where it was shown that the defendant was the owner of an automobile, and that the operator or chauffeur was in his employment for the purpose of operating the machine, it was held that

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3. See Reynolds v. Buck, (Iowa 1905) 103 N. W. Rep. 946.

It is the rule of the common law that the master is reponsible for the acts of the servant whom he selects, and through whom in legal contemplation he acts, provided that the particular act was done by the servant in the carrying out of the duty given to him by his master, and for the purpose of doing what he has been sent out to do. Fiero on Torts, p. 86.

4. Clark v. Buckmobile Co., 107 N. Y. App. Div. 120; Stewart v. Baruch, 93 N. Y. Supp. 161.

there was a sufficient *prima facie* showing that the chauffeur at the time of the collision was acting within the scope of his employment.[5] In Collard v. Beach, 81 N. Y. App. Div. 582, it was held that the court erred in refusing to give the following charge to the jury as requested: "If the jury finds either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then in either case the defendant is responsible and liable for that negligence and its consequences." Concerning the liability of the owner of an automobile for the acts of one operating the machine an interesting case arose in *Iowa*. In Reynolds v. Buck, decided by the Supreme Court of Iowa in June, 1905 (103 N. W. Rep. 946), it appeared that the defendant who dealt in automobiles decorated one for use in a parade, and after the parade directed that the automobile which stood in front of the store be taken inside, and he then left. His son, employed by the defendant as a clerk, and who had been given a holiday that day, coming upon the machine where it stood, invited a lady friend to ride, and while he was driving plaintiff's horse took fright at the machine, whereby plaintiff was injured. It was held that defendant was not liable, even conceding the son's negligence. The court said: "At the time of the accident causing the plaintiff's injuries the defendant was a dealer in agricultural implements, buggies, automobiles, etc., in the city of Davenport, and his son, Emil J. Buck, was in his employ as clerk. There was an automobile parade in the city

5. Stewart v. Baruch, 93 N. Y. Supp. 161.

of Davenport in the afternoon of the day in question, and, on the solicitation of the committee having the matter in charge, the defendant decorated an electric automobile belonging to him, and the machine, operated by one of his daughters, had a place in the parade. The son, Emil J., who had been employed in his father's establishment for some time, was given a lay-off or holiday for the parade. He spent the forenoon of the day in decorating a steam automobile that he intended to use in the parade, and in the afternoon, during a part of the time that the parade was in progress, he and some of his friends used the steam machine on the streets. They then returned it to the defendant's place of business and left it on the premises; and soon thereafter the son and his companions, young men and women, went to the river. In the meantime the parade was concluded, and the electric machine was returned to the defendant's place of business by the daughter, and left on the street in front of the store. The defendant was present at the time and directed an employee to take it in, and soon thereafter he left the store. A short time after the defendant had left the store the son, Emil J., and a young lady friend returned thereto, and she, desiring to go home from there, accepted his invitation to ride home in the automobile. He took her to her home by the nearest route, and on his way back to his father's store the plaintiff's horse became frightened at the machine, and the accident happened, resulting in the injury complained of. Conceding, for the purpose of this appeal, that the son was negligently operating the machine at the time of the accident, was such negligence chargeable to the defendant under the evidence? We are clearly of the opinion that it was not. The direct evidence all shows that his use of the electric automobile was solely for the pleasure and convenience of the young lady and himself, and that it was in no way

or sense connected with his employment or with the defendant's business. The mere fact that the automobile still wore the decorations, and that it might on account thereof attract attention and incidentally advertise the defendant's business, would not have justified the jury in finding that the son was about his father's business at the time. An inference so far-fetched would not be permitted to control and destroy direct and positive evidence to the contrary (Meyer v. Houck, 85 Iowa 319, 52 N. W. Rep. 235). The son had been given a holiday and was master of his own time on that day. This is conclusively shown. The defendant had ordered the machine put away, and did not know that his son wished or intended to use it. It was taken and used for the son's own pleasure, and we think the verdict was properly directed for the defendant." See Chapter XX.

§ 6. Duties of chauffeur.

The careful and prudent chauffeur constantly should have in mind the legal significance of his acts especially in reference to their effect on the liability of his employer. There are many specific precautions of which every chauffeur or operator of an automobile should have knowledge in order to keep himself and his employer within the bounds of freedom from legal liability. First, the statutory requirements or precautions of the state wherein the machine is run should be known and obeyed. The provisions in reference to lamps when running at night, the displayment of numbers, the necessity for locking the machine when left temporarily in the street, requirements pertaining to speed, meeting horses, and other matters should be so familiar that correct action will take place automatically and without taking time for unnecessary thought. The statutory requirements are not all, however, that the prudent automo-

bile operator must understand. The courts have commenced to lay down rules in reference to operating motor vehicles, and these are as binding on the operator as the legislative regulations. Let us see what the courts have said. For example, the *New York* statute provides that a person operating a motor vehicle shall at request or on signal by putting up the hand, from a person riding, leading, or driving a restive horse, bring such motor vehicle immediately to a stop. Similar provisions exist in many of the states which have enacted automobile legislation. It will be noticed that the autoist is required to stop his car *on signal.* There is no necessity, however, for the giving of such a signal as provided by statute. The motorist is obliged to stop even if no signal has been given where his machine is apparently causing danger. The duty to stop in such cases is independent of statute, and it has been expressly so held by the Supreme Court of *Illinois* and other courts.[6] Knowledge of this rule and other rules which have been promulgated by the courts is of importance.

§ 7. Amount and degree of care.

The amount and degree of care which the operator of an automobile should exercise depends upon the circumstances of each particular case, including the condition of the road, the existence or nonexistence of traffic, and other facts. Reasonable care must be exercised to avoid accidents. More than ordinary care must be exercised when children are met in the street.[7] The law, however, is not all against the automobilist and in favor of other

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6. Christie v. Elliott, 216 Ill. 31, 1 L. R. A. (N. S.) 124, 74 N. E. Rep. 1035.

7. Thies v. Thomas, 77 N. Y. Supp. 276.

parties. The motorist also has rights which must be respected. If he has complied with the law his rights on the road are equal to the rights of other parties. He has the right to assume, and to act upon the assumption, that every person whom he meets will also exercise the ordinary care and caution according to the circumstances, and will not negligently or recklessly expose himself to danger, but rather make increased exertion to avoid collision.[8]

No matter how great the rate of speed may be which the law permits, the operator still remains bound to anticipate that he may meet persons on a public street, and he must keep his machine under such control as will enable him to avoid a collision with another person also using care and caution. If necessary he must slow down and even stop. No blowing of a horn, or of a whistle, nor the ringing of a bell or gong, without an attempt to slacken his speed, is sufficient, if the circumstances at a given point demand that the speed should be slackened or the machine stopped, and such a course is practicable, or, in the exercise of ordinary care and caution proportionate to the circumstances, should have been practicable. The true test is, that he must use all the care and caution which a careful and prudent driver would have exercised under the same circumstances. The operator of an automobile is not exempt from liability for a collision in a public street by simply showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by law.[9]

In turning corners a person, whether an adult or an infant, has the right to assume that the operator of an automobile will exercise care and respect the rights of pedestrians. Due care in operation requires, under such

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8. Thies v. Thomas, 77 N. Y. Supp. 276.
9. Thies v. Thomas, 77 N. Y. Supp. 276.

circumstances, that the vehicle should be slowed down and operated with diligence. At such a place the operator is bound to take notice that people might be crossing, or entering thereon; and this obligation on the part of the operator of the machine is one which a pedestrian has a right to assume will be observed.[10]

When the automobile is temporarily left unattended in the street, certain precautions should be taken by the chauffeur to prevent the machine from being started by intermeddlers, but it is not the operator's duty, as correctly stated in the opinion of a *New York* case, to chain the machine to a post or to fasten it so that it will be absolutely impossible for a third party to start it. Only reasonable care is required to be exercised in such a case. Of course, where a statute requires a certain manner of locking the machine, the requirement must be complied with.[11]

§ 8. Rights of chauffeur.

Ordinarily where the chauffeur's contract for service is for a certain time, if the employer discharges the chauffeur before the expiration of the term of employment, the employer is still liable for the chauffeur's pay unless the latter has given cause by showing himself unable or unwilling to do what he has undertaken to do.[12] But if the contract is for a time certain, and the chauffeur leaves without cause before the time expires, it is held that a servant in such a

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10. Buscher v. New York Transportation Co., 94 N. Y. Supp. 796.

11. Berman v. Schultz, 40 Misc. (N. Y.) 212, 84 N. Y. Supp. 292, holding that where a chauffeur left an automobile in the street temporarily, after turning off the power and applying the brake, and the automobile was started by the willful act of boys, resulting in a collision with a wagon, the act of the boys was the proximate cause of the injury, and there was no liability on the part of the owner.

12. Parsons on Contracts, vol. II., (9th ed.) 34.

case has no claim for services already rendered. However, if prevented from performing his duties by sickness, or similar inability, the chauffeur may recover pay for what he has done on a *quantum meruit*.[13] It must not be forgotten that the contract between the chauffeur and his employer is mutual. The employer has a claim against the chauffeur for neglect of duty, and the employer does not waive this claim by paying the chauffeur and continuing him in his service.[14]

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13. Parsons on Contracts, vol. II., (9th ed.) 36–40.
14. Parsons on Contracts, vol. II., (9th ed.) 48.

CHAPTER XX.

CHAUFFEUR'S AUTHORITY TO BIND HIS EMPLOYER.

(See Chapter XIX.)

§ 1. General considerations.

The question to what extent an employer is legally responsible for the acts performed and contracts made by his chauffeur is one which affects all automobilists who employ drivers. There are probably more court decisions concerning the owner's liability for his chauffeur's conduct in driving than regarding any other legal aspect of motoring. The following propositions have now been definitely established.

1. The chauffeur is an employee and a servant of his employer while engaged in the business for which he is hired.

2. He is employed to operate and drive his employer's car only at such times and to such places as designated by his employer personally, or his agent, either expressly or by implication.

3. Any driving for the chauffeur's own pleasure at times or to places not authorized expressly or by implication by the employer does not constitute driving for the employer, and an injury occurring while so driving will not bind the employer.

4. In order to hold the owner of an automobile responsible for an alleged injury caused by any other person driving his machine, the relation of master and servant must have existed at the time.

5. The borrower of an automobile cannot make the person loaning it responsible for the former's conduct or acts. There is no relation of master and servant in such a case. There is no hiring.

Although as a general proposition it is laid down that an owner of an automobile may not be held legally liable for the acts of the chauffeur which are committed when not engaged in the owner's business, it is, however, difficult to determine in every case when a chauffeur does not act for his employer. He is hired to drive the automobile and to care for it, but the terms of his employment, generally speaking, authorize him to drive only as directed. In other words, he has no independent action of his own volition. If he is to drive with authority to a certain city, for example, he must have either express or implied permission to do so. If he orders supplies for the automobile he must also have similar authority.

The owner of an automobile is not necessarily liable for an injury committed by his chauffeur while driving the automobile with the owner's consent, if the chauffeur was driving at the time for his own pleasure or business. This is what the Appellate Division of the Supreme Court of New York has just decided, and decided correctly, in the case of Cunningham v. Castle, reported in the New York *Law Journal* of Monday, July 20, 1908, 127 N. Y. App. Div.

580, 111 N. Y. S. 1057. The owner had loaned the chauffeur his automobile for a certain length of time, during which time an injury was inflicted on the public highways. The opinion of the court is based upon the theory that there was no relationship of master and servant when the injury was inflicted. The consent to use the machine did not make the owner liable. The case was the same as any other where a person loans one vehicle to another. Although the court in this case did not cite the authorities, there are, nevertheless, two decisions in this country which hold that the owner of an automobile cannot be held legally responsible for the acts of a borrower.

Just exactly under what circumstances an owner is responsible for the acts of his chauffeur, and when authority, or at least the presumed relation of master and servant, does or does not exist is a question not often easy to decide.

In the case mentioned Judge Houghton dissented. The facts in this case as disclosed by the evidence were as follows:

The plaintiff called the defendant as a witness, who testified: "I owned a Mercedes automobile and employed one Harry Boes as a chauffeur at that time. I had been out in the automobile the day before this [accident] occurred. After my return the automobile was left in the possession of Harry Boes, my chauffeur. At that time he asked me if I would loan him the machine to go uptown on some business for himself. I told him yes, but to hurry back; only to be gone a short while; come right back. That was all that took place between the chauffeur and myself as to loaning him the machine. It was about 11 o'clock at night that I returned to my apartment and loaned Harry Boes the machine."

Boes testified: "I was Mr. Castle's chauffeur, and had been in his employment at the time of this accident to the

best of my knowledge about two and a half or three months. On the night before this injury happened, which was Sunday night, previous to the time when I went out when the accident happened, I had been out with Mr. Castle. I left him at the Pierrepont Apartment in Thirty-second street, right near Broadway. On leaving him I spoke to him about borrowing the machine or as to letting me have the machine for purposes of my own and my own pleasure. I said: 'Mr. Castle, may I use your car for an hour or two? I just want to take a run up to Harlem and be back in an hour or an hour and a half or two hours.' Then he said: 'All right, be careful; if anything happens be sure to notify me right away.' That was his consent. I took it out for purposes of my own entirely, for my own pleasure, and not on any business of Mr. Castle's. It was about ten minutes to 11 that I asked Mr. Castle for permission to take it out."

The chauffeur then went to Shanley's, where he was joined by two women and a friend He took them uptown, and was coming down Eighth avenue from 150th street when he struck the plaintiff at Eighty-first street and Central Park West, about half past 1 in the morning.

In considering these facts the court lays down the following propositions of law which are controlling in similar cases:

"From the foregoing cases we may deduce the following rules as thoroughly established: *First,* that a master is responsible for the negligence of his servant when engaged about the master's business, and within the scope of his employment; *second,* that a master is not responsible for the negligence of his general servant if at the time of the negligence he has become *ad hoc* the servant of another, and engaged in the business of that other and under his direction and control; *third,* that the master is not responsible for the negligence of his general servant if the negligent act was

committed by the servant not in the prosecution of the master's business but in the course of some private enterprise of his own; *fourth,* that even if in the prosecution of that private enterprise the servant uses the instrumentalities of the master for his own purposes, without the knowledge and consent of the master, the master is not responsible."

In response to the contention that the automobile is a dangerous instrumentality, and that having been entrusted to the chauffeur the master is liable because of its dangerous character, the court said:

"The automobile is not a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous than a team of horses and a carriage; or a gun, or a sailboat, or a motor launch. If a game-keeper had borrowed his master's gun and had gone from the estate on a hunting expedition of his own and had negligently shot a man, would the master be responsible because he was using that instrument if carelessly used, the gun? I do not think that the question of ignorance or consent of the master has any bearing whatever upon his liability. The fact that the servant has used the horses or the automobile without his consent has probative force upon the proposition as to whether or not the servant was engaged in the master's business and was acting within the scope of his employment."

Judge Houghton in the dissenting opinion argues that: "While a powerful automobile may not, strictly speaking, be deemed a dangerous instrument, it may become so if recklessly driven. They are so dangerous that the Legislature has prescribed that their ownership must be registered, and the driver licensed, and that speed in different localities must be regulated. If a railroad official should loan a locomotive to one of the company's engineers for the purpose of hurriedly visiting a distant locality it could hardly

be said that the engineer alone would be liable for injuries inflicted upon third persons. I appreciate that the case is on the border line, but it seems to me that the chauffeur was engaged in the business of the master."

The great importance of the above decision rests upon the fact that consent to the use of the car is immaterial.

The legal doctrine of agency are playing an important part in everything that has to do with the automobile, and our courts are now frequently called upon to determine the rights and liabilities of parties arising out of the acts of their agents. The vital question, on which every controversy hinges, is, "Was the party acting as an agent or servant at the time he committed the unlawful act or made or broke the contract?"

The most important relation of agency (so far as the automobile industry is concerned) is that of employer and chauffeur. The latter manages and operates the car, and while so doing renders his employer liable for whatever negligent injuries are committed by him while acting under authority from the owner; but when a chauffeur is or is not acting according to authority is a matter difficult to determine. For example, a chauffeur takes the owner's car and drives for his own pleasure. While so driving he runs over a pedestrian. Is the owner liable? The courts have held that in such a case the employer is not liable, since at the time the chauffeur did not act for his employer. It is also held that an injured party who attempts to hold the owner of an automobile liable for damages done by a chauffeur must allege and prove that the employee acted for the master. There are a large number of decisions to this effect, although in *Missouri* the contrary is held. The doctrine there is that the injured party need not allege and prove that the chauffeur was acting for his employer, but that the

law would presume that a chauffeur acts according to instructions while driving the car of another.

There may be cases where it is doubtful whether one occupies the relation of chauffeur to the owner of the machine. In order to hold an owner liable the relation of master and servant must exist, and unless this relation is established, there can be no liability on the part of the owner. For instance, where an owner lets out his car to another on commission, the other party using it in a livery business and being himself the driver, it is held that there is no liability on the part of the owner for the acts of the driver, since there is no relation of master and servant between them.

As to whether a chauffeur is such an agent of his employer that he may bind his employer for certain current supplies purchased, there can be but little doubt. It is the general custom for chauffeurs to purchase supplies and parts, and a dealer or manufacturer has the right to presume that a chauffeur acts for his principal in making such contracts. For a chauffeur to obtain a secret commission on the sale of supplies or parts to the detriment of his employer is clearly illegal under both the common and statutory law. It is his duty to give to his employer every possible advantage to be gained from any transaction connected with his employment.

Of the contractual rights and liabilities arising out of automobile agencies it is not an easy matter to determine in all cases if the party is the agent of another. Take, for example, automobile salesmen. Are they agents of dealers or manufacturers? In a certain sense they are, while in another sense they are not. In certain ways they may bind their principals and cannot bind them in other respects. Ordinarily they are to be considered more in the light of brokers than of agents. However, representations and statements made by sales agents, if fairly within the scope

of what might be deemed their general authority, will bind their principals. Owing to the facts that automobile manufacturers and dealers occupy a more or less fiduciary relation toward their customers and the public, it will, no doubt, be the tendency of the courts to construe all contracts, representations and statements most strongly in favor of the public and against dealers and manufacturers.

The phrase "unauthorized use of automobiles" is very comprehensive, and includes many acts which are not only civilly wrong, warranting an action for damages, but which are criminal; as, for example, driving without a license or without numbers, violating the speed regulations, etc. However, what we wish to discuss here is that use which is not strictly criminal and prohibited by statutory enactment, but which violates the common law right of the owner of the vehicle, constituting an invasion of his right of property. The law books call it a conversion of the property belonging to another.

The conversion of an automobile is of very different occurrence, owners often complaining that their chauffeurs make personal use of the cars which they are hired to use only in the interest of their employers. Ordinarily, the authority which a chauffeur possesses over the car entrusted to his care is very broad. It is part of his duties to keep his car in good working condition, and in order to do this it is often necessary to test or try the car out, which is ordinarily done while the owner is not in the machine. The scope of the chauffeur's authority may not be subject to precise definition, but it is certain that he has no implied authority to drive the car for his own pleasure or that of his friends. Such authority is not implied in the relation which exists between chauffeur and employer. Of course, if the owner permits the chauffeur the use of the automobile for the latter's own pleasure, then such a use is illegal. Also,

if the employer has in the past permitted his chauffeur to use the automobile, the subsequent personal use of it may be authorized by implication from previous express authority. Wherever, however, there is neither express nor implied permission to use the car, its personal use by the chauffeur constitutes conversion. In some of the states it is expressly prohibited by law for a chauffeur to use his employers' automobile without permission, under penalty of prosecution.

Garage keepers, who have entrusted to them machines either for storage or repair, may not lawfully use them for any purpose inconsistent with the relation existing between them and their patrons. If a machine is left for the purpose of making repairs, naturally the garage keeper possesses the authority to run the machine in whatever manner is necessary in order to determine what repairs are needed, and also to determine if the machine is in good working order after the necessary repairs have been made; but if he uses or permits the machine to be used for his own interests, then he commits a conversion of the property and is liable in damages therefor.

A hirer of an automobile also commits a conversion if he rents a car from an owner for driving to a certain named place, and then drives to some other, farther point, and he may be held liable in damages, especially if the machine should break down while being driven over the unauthorized course. In hiring a vehicle for driving to any particular place one is not obliged to take any definite route, and if one hires a machine for a certain length of time he may use the machine as he pleases as far as distances are concerned, provided he returns it at the stipulated time. In making use of an automobile of another, no matter in what capacity, it is the safest plan to have the authority defined

at the time the relation is created, and then to use it strictly in conformity with this authority.

§ 2. When the employer is liable.

The owner of an automobile is liable for any acts of his chauffeur done within the scope of his employment, and if a chauffeur is acting in the exercise of his employer's orders, and by his negligence causes injury to a third person, even though the chauffeur's act was not necessary to a proper performance of his duty, the employer is responsible. Thus, where an owner instructed his chauffeur to go down-stairs in the hotel at which they were stopping and procure oil for the lamps of his automobile, and the chauffeur, instead of following these directions, ran the automobile to a nearby garage for the purpose of obtaining the oil, negligently colliding with a wagon on the way, the owner was liable for the resulting damage. Bennett v. Busch, 67 Atl. 188. In John M. Hughes Sons Co. v. Bergen & West Side Automobile Co., 67 At. Rep. 1018, it was held that the trial judge was justified in finding that the plaintiff's automobile was damaged through the negligence of the defendant's employee while he was using the car in the defendant's business and acting within the scope of his employment.

§ 3. Chauffeur teaching operation of automobile.

Where the contract of sale of an automobile provided that an instructor should be furnished by the company selling the machine to give lessons in its operation to the purchaser and that the instructor would adjust and test the machine until the lessons were completed, the company was held to be responsible to the purchaser for any damage to the automobile through the negligence of the instructor while the latter was acting within the scope of his duties. But it was held that the owner could not recover damages

from the company for the detention of the automobile while it was being repaired where he offered no proof as to the market rate of hire of a similar machine. Burnham v. Central Automobile Exchange, 67 Atl. Rep. 429.

Where a chauffeur was employed to teach the owner's son to run an automobile for the family use, it was held that the relation of master and servant existed so as to hold the owner liable for the negligence of the chauffeur in causing injury to a pedestrian. $1200 was not excessive damages where the plaintiff was 63 years of age and was injured on the head and hip. Hiroux v. Baum, Wis. 118 N. W. 533.

§ 4. Responsibility under English act.

Under the British Motor Car Act of 1903, the person causing or permitting a motor car to be used contrary to regulations is held responsible as well as the driver in certain instances. Pettitt, Law of Motor Cars, 62; Pettitt, Law of Heavy Motor Cars, 58; see also Lewis v. Amorous, 59 S. E. Rep. 338.

§ 5. Presumption of authority.

Where an automobile is operated by a person employed for that purpose, it will be presumed that he is acting within the scope of his authority and about his employer's business; and such presumption is not changed by the fact that the chauffeur, in operating the automobile, makes a detour from the direct route between his employer's home and a place to which he was directed by his employer to go. See Long v. Nute, 100 S. W. Rep. 511.

§ 6. Ownership of vehicle.

Where a corporation admitted in its answer that it operated and controlled vehicles used in a city, and did not

give evidence that it did not operate a particular vehicle bearing its name, proof that the particular wagon colliding and injuring the property of another bore the same name of the corporation established *prima facie* ownership of the wagon. Gershel v. White's Express Co., 113 N. Y. Supp. 919.

§ 7. What must be shown.

In an action against an owner of an automobile to recover damages for personal injuries resulting from being run down by the machine, the plaintiff must show not only the fact that the person in charge was the defendant's servant, but the further fact that he was at the time engaged on the master's business, with the master's knowledge, and by the master's direction. Evidence of mere ownership of the machine is insufficient. Lotz v. Hanlon, 217 Penn. St., 339; 66 Atl. Rep. 525,

The complaint of one who has been injured by an automobile should show either expressly or by necessary implication, not only the existence of the relation of master and servant, but also the connection of the act with the employment. Lewis v. Amorous, 59 S. E. Rep., 338.

In Lotz v. Hanlon, 217 Penn. St., 339, 66 Atl. Rep. 525, it is held that where a party sues to recover for injuries received by being run down by an automobile, the party suing must not only show the person in charge of a machine was at the time the owner's servant or chauffeur, but also that he was at the time engaged on the master's business, with the master's knowledge and direction.

The defendant owned an automobile which broke down on the way from Atlantic City to Philadelphia, and which he then left in charge of his driver, with directions to repair it and bring it on to Philadelphia. After the driver had reached the Delaware River, and while waiting for the

ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making the trip his car collided with a horse and buggy, injuring the plaintiff. The court held that under the circumstances the owner of the automobile was not liable for the injury, since his servant, the chauffeur, was not engaged in his, the owner's, business at the time. Patterson v. Kates, 150 Fed. Rep., 481.

The plaintiff, who was the owner of an automobile which he desired to sell, was about to deliver the machine to the defendant for sale on commission, when the defendant's servant L. directed the plaintiff's servant to retain the machine until the succeeding day, which was Sunday, that the servant L. might show it to a prospective purchaser, the defendant's garage being closed on Sunday. This was agreed to, whereupon on Sunday L. took the machine, and while using it on a pleasure trip of his own it was struck by an electric car and destroyed. The court held that L. while so using a machine was not acting in the course of the defendant's business, and that the latter was not therefore responsible for the loss of the machine. Evans v. A. L. Dyke Automobile Supply Co., 101 So. West. Rep., 1152.

In Vonderhorst Brewing Co. v. Armhine, 56 At. Rep., 833; 98 Md., 406, it is held that where it is proved that the vehicle belongs to the defendant, the burden of proof is on the defendant to show that the driver was not his agent. This ruling is contrary to the great weight of authority, excepting in Missouri, where the doctrine is the same as in Maryland. See Long v. Nute (Mo.), 100 S. W. Rep., 511.

Where the plaintiff was injured by the defendant's automobile, operated by the defendant's chauffeur, but the defendant testified that the chauffeur was acting without his authority and against his express commands, failure of the

defendant at the time he was served with the summons and complaint to deny that the chauffeur was acting at the time of the accident as his employee and in the performance of duties for him, cannot be considered as proof that the agent had authority. McEnroe v. Taylor, 107 N. Y. S. 565.

§ 8. **Chauffeur driving for himself.**

Where the chauffeur commits injury while driving for himself his employer is not liable. Sawyer v. Mitchell, 35 Supr. Ct. (Pa.) 69.

Where a chauffeur took an automobile for his own use to a different place from where he was directed to take it, it was held that the relation of master and servant did not exist. In this case the chauffeur was ordered to take an automobile to an hotel and he went a mile out of the road in an opposite direction to make a call, and was then on his way to the hotel when he caused the injury, but this was while he was on an errand for himself. The court said, "knowledge that M. was habitually careless in the operation of the automobile has no tendency to prove that the defendant ought to have known or anticipated that he would steal the vehicle, or use it for his own purposes contrary to the owner's explicit order." Danforth v. Fisher, (N. H.) 71 Atl. 535.

Where the defendant, when sued for repairs to his automobile, counterclaimed that plaintiff had used the automobile without the defendant's knowledge or consent, it was held that the defendant was only entitled to recover the reasonable hire of the machine for its actual use as found by the jury. Bush v. Fourcher, 59 S. E. Rep., 459.

Where the defendant claimed that the plaintiff had used his automobile without his knowledge or consent, whether

the plaintiff made a practice of doing so was held to be immaterial. Bush v. Fourcher, 59 S. E. Reporter, 459.

§ 9. When relation of master and servant does not exist.

Where a daughter 19 years of age was accustomed to use an automobile, asking permission when her father was at home, but sometimes taking it without permission when he was not at home, it was held that the relation of master and servant did not exist where she was not driving other members of the family, but was using the machine as a means of recreation and pleasure for herself and her own friends. Doran v. Thomsen, N. J. 71 Atl. 296.

In Braverman v. Hart, 105 N. Y. Supp. 107, the Supreme Court of New York held that the owner of an automobile who delivered it to a person not under his control or direction, under an agreement that he was to use it for hire and pay the owner the purchase price out of the money derived from its use, was not liable for an accident by the person's negligence in operating the automobile.

In Parsons v. Wisner, 113 N. Y. Supp. 922, it was held that the defendant was not liable for injuries to the plaintiff in a collision with the defendant's automobile, while the machine was being operated by a chauffeur employed by the defendant's brother, who had control of the automobile as bailee. *Citing* Cunningham v. Castle, 127 App. Div. 580; 111 N. Y. Supp. 1057.

If a motor-car company supply a chauffeur and provide a garage for a privately owned motor-car, is the chauffeur to be considered the servant of the company or of the owner of the car during the time that he is in charge of it? This was the question for determination in the recent English case of Norris v. Wolsley Tool and Motor-Car Company, where the company was sued for damages caused to the plaintiff by the negligence of its chauffeur while in

charge of a car belonging to a Mr. Aird. The chauffeur was directed by Mr. Aird to drive him to a railway station, thence to go on to another place, and later to fetch Mr. Aird from the station again. The chauffeur, having finished part of his work, chose to deviate from his route in order to go home on his own account, and, in returning to resume the work, negligently ran into and injured the plaintiff. It was contended that the chauffeur, being at the time of the accident engaged on Mr. Aird's business and subject to his directions, must be deemed to be his servant for the time being; but the court preferred to follow the leading cases of Quarman v. Burnett, 6 M. & W. 499, and Jones v. Liverpool Corporation, 14 Q. B. Div. 890, and to hold that the chauffeur was all the time the company's servant, for whose negligence they were responsible. *Law Times,* December 14th, 1907.

An express company hired an automobile from another corporation for the purpose of delivering packages, and the former corporation employed the chauffeur, whose sole duty it was to operate the vehicle, he being accompanied by a servant of the express company who delivered the packages. After the packages had been delivered the vehicle returned to the express company's office, where the chauffeur informed the person in charge that there was some trouble with the machinery, and the chauffeur then left in the vehicle, either to take it to the corporation's office or to go for his lunch, and on his way ran over the plaintiff's intestate. Held that the express company was not liable, as the chauffeur was not its servant at the time of the accident. Bohan v. Metropolitan Express Company, 107 N. Y. S. 530.

In an action against the owner of an automobile to recover damages for personal injuries, the result of a collision between the automobile and the plaintiff, the owner

showed that he had delivered it to the person who was driving it at the time of the accident, pursuant to an agreement, by the terms of which the latter was to use the machine for the purpose of hire and pay the purchase price to the owner out of the proceeds derived from its use. The driver was shown not to be in the employ or in any way under the control of the owner and under these facts it was held that, even if the driver were guilty of negligence, his negligence was not imputable to the owner. The owner, consequently, was not held liable in damages. Braverman v. Hart, 105 N. Y. Supp. 107.

An owner of an automobile is not liable for an injury caused by the negligent driving of a borrower, if the machine was not used at the time in the owner's business. Doran v. Thompsen, 66 Ht. Rep. 897; Beaverman v. Hart, 105 N. Y. S. 107.

In Parsons v. Wisner, 113 N. Y. Supp. 922, it was held that the defendant was not liable for injuries to the plaintiff in a collision with the defendant's automobile, while the machine was being operated by a chauffeur employed by the defendant's brother, who had control of the automobile as bailee. *Citing* Cunningham v. Castle, 127 App. Div. 580; 111 N. Y. Supp. 1057.

A motor car, after having been repaired by the defendants, was sent back to the owner under the charge of a driver who was in the employ of the defendants. The driver received instructions from the defendants not to give up the driving to any one. At one stage of the journey, a man not in the employ of the defendants accompanied the driver, who, hearing a noise at the back of the car, entrusted the driving to his companion while he himself went to the back of the car to ascertain the cause of the noise. His companion, while driving negligently drove the car against the plaintiff's van. In an action to recover

damages in the County Court, the jury found a verdict for the plaintiff. The Divisional Court held that, as there was no necessity for keeping the car going while the driver examined the machinery, and therefore for entrusting the driving to the driver's companion, the defendants were not liable for the negligence of the latter. An appeal in this case was taken, but the Appellate Court did not consider the question raised, since the correct procedure for its review was not taken. Upon appeal, it was held that as the question of the necessity for trusting the car to a third person was not raised in the County Court nor by the notice of appeal to the Divisional Court, it could not be raised afterwards and the verdict and judgment for the plaintiff must stand. Decision of the Divisional Court (22 The Times L. R. 556) reversed. Harris v. Fiat Motors (Limited) (C. A.)

Where the owner or person in possession of an automobile merely permits another to use it, the latter does not thereby become the agent or servant of the former, so as to charge the one with the other's negligence. Lewis v. Amorous, 59 S. E. Rep. 338.

§ 10. Authority to purchase supplies.

A case of some interest occurred in the State of New York where the chauffeur purchased supplies for an automobile, and it was held that a chauffeur in charge of a motor vehicle has no authority, either apparent or implied, to order permanent repairs thereto on the credit of his employer, or any other repairs, except such as are necessary to enable him to continue his journey. (See Gage v. Callahan, 109 N. Y. Supp. 844.)

It would seem that supplies purchased by a chauffeur which are reasonably necessary for the purpose of continu-

ing his journey, which in itself is authorized, may be purchased by him, and his employer will be compelled to pay the bills. The theory of this rule is that the chauffeur having been ordered to proceed to a certain place, he necessarily must have authority to buy the things necessary to carry him there, such, for instance, as gasoline, oil and probably parts of the car which have become lost or broken. But there is no authority to make any permanent repairs to the car. Most certainly a chauffeur would not have authority to have a car repainted, unless he were expressly given the power to do so, or to have new shoes put on the car. However, the chauffeur's authority in these respects might be presumed by law, where, according to the custom of dealing between the supply man and the owner, the chauffeur has been given full authority to order whatever is necessary for the car, as though he were the owner. In such a case custom would broaden the authority of the agent.

The tendency of the court decisions is to hold that the owner is not responsible for the acts of his chauffeur, unless it is alleged and proved that at the time of the commission of an injury the chauffeur was acting for the master.

§ 11. Pleading.

In an action for negligence of the defendant's chauffeur in driving an automobile, a statement is sufficient which avers that the approach of the automobile frightened the plaintiff's horses, which fact the chauffeur must have seen, yet he continued to drive toward the horses at a high rate of speed, causing them to break from the plaintiff's control and run away. Rupp v. Snyder Automobile Company, 21 York (Pa.) 177.

In an action to recover for injuries caused by the defen-

dant's automobile while operated by a servant, a motion, before answer, for a bill of particulars to enable the defendant to answer, will be denied, where the defendant denies all knowledge as to the matters alleged in the complaint. Bailey v. Mayer, 107 N. Y. S. 624, 56 Misc. Rep. 331.

CHAPTER XXI.

THE MANUFACTURER OF AUTOMOBILES.

§ 1. General considerations.

Among the many reported judicial decisions concerning motoring and the motor car, no reported case in reference to the manufacturer's part played in automobiling has as yet appeared, though circumstances have happened pointing in a direction to what reasonably might be expected from litigation in the near future. No person is more intimately connected with motoring, and of so vital importance in qualifications, as the manufacturer. The position of the chauffeur, in regard to his prudence, intelligence, and carefulness, is somewhat insignificant compared with the great responsibility resting upon the shoulders of the automobile constructor, and yet the latter has not been deemed an individual of sufficient police regulatory account to be considered a favorable subject of legislative control in regard to the safe manufacture of safe machines. The thousands

of automobiles which are being turned out every year, and the hundreds of new incorporated companies which are being formed for the purpose of manufacturing motor vehicles, necessarily will be felt in occupying the attention of the courts. We have only to wait for the decisions to come—they are bound to arrive.

§ 2. The manufacturer's status.

The manufacturer of automobiles occupies a position of serious responsibility, not only to his customer and the users of his car but to the public. He is providing a powerful carrying machine to run on the public streets and highways in the midst of traffic. This he knows and fully realizes. His position is one of trust and confidence. On him rely his customers and others for the safe construction of machines in workmanship and material.

§ 3. Quality of cars already turned out.

The cars turned out thus far have proven no defects in construction and no use of inferior materials so far as to render them dangerous for their contemplated use. The manufacturers have established a feeling of safety and reliance in the people. But have we the assurance of a continuation of this feeling of confidence?

§ 4. American tendencies.

From our American experience regretfully we have to say that our industry is apt to be contaminated with adulteration and substitution. We know that the cost of production is sought to be reduced by using cheaper labor and inferior materials. This reasonably may be expected in the manufacture of automobiles on the part of some producers if precautions are not taken. There are, and will be,

of course, many automobile manufacturers whose products always will stand for the best and safest material and workmanship. The very cheap machine and its manufacturer, however, will need our serious consideration.

§ 5. Duties and responsibilities of manufacturer.

Speaking generally, what are the duties and responsibilities of the automobile manufacturer in putting an automobile on the market? It must be conceded that a safely constructed motor vehicle is not of itself a dangerous machine, and only becomes a source of danger to the occupants through faulty construction or improvident driving. We have simply the case of a manufacturer placing on the market for sale a vehicle of somewhat complicated machinery of high speed power and used for the transportation of persons. What is the law governing such a manufacturer? Since no cases concerning the automobile and dealing with the subject under discussion have arisen for determination by the courts, we are compelled to reason from a consideration of cases decided in reference to the manufacure and sale of machines and articles generally other than vehicles. Without reviewing the decisions concerning the manufacturer's liability for the sale of defective machinery, it would be impossible to say more than that the manufacturer of an automobile impliedly warrants to purchasers that the vehicle is reasonably fit and safe for its contemplated use. Any negligence on the part of the manufacturer or his servants in constructing the automobile, or in the use of improper materials, subjects the manufacturer to liability in damages for an injury received by the party purchasing the machine who is injured while exercising due care. There are many other questions which suggest themselves from a consideration of the automobile manufacturer's position, questions of

importance and some little difficulty, but for the present the suggestion that there is serious responsibility resting upon the manufacturer probably is sufficient. Sir Frederick Pollock says that where the builder of a carriage, or the maker of a machine, has delivered it out of his own possession and control to a purchaser, he is under no duty to persons using it as to its safe condition, unless the thing was in itself of a noxious or dangerous kind, or, it seems, unless he had actual knowledge of its being in such a state as would amount to a concealed danger to persons using it in an ordinary manner and with ordinary care.[1]

Automobile engineering has its legal aspect. If anyone doubts the truth of this assertion he has only to listen to the complaints of purchasers of pleasure cars who have been either disappointed or defrauded, or of those who have bought commercial vehicles under promises and representations which were and could not be carried out Take, for instance, the case of a car traveling along the road at a fair rate of speed, when suddenly without warning it shoots off the highway over a declivity. The steering gear broke or a knuckle cracked perhaps; serious injury is done, but who is to blame? This is not a case of overspeeding, nor of driving over a dangerous road, but merely of using an automobile in the ordinary way. No one is to blame for the accident except the manufacturer. He cannot excuse himself on the ground that the person who supplied the steel which went into the construction of the automobile is to blame; neither is he exempt from responsibility because his employees did not exercise a high degree of care in the manufacture of the parts of the vehicle. The

1. See Pollock on Torts, p. 632. See also Winterbottom v. Wright, 10 M. & W. 109; Collis v. Sheldon, (1868) L. R. 3 C. P. 495, 37 N. J. C. P. 233; Losee v. Clute, 51 N. Y. 494.

manufacturer is responsible for the misdoings of his workmen, and it is his duty to see to it that his product is not defective when it leaves the factory. This is an active and positive duty requiring much care and pains. There are other duties resting upon the shoulders of automobile manufacturers, but before considering them we will ascertain the legal status of those who are producing power vehicles to run upon our public thoroughfares.

As a warning, let it be said at the outset that automobile manufacturers should be far-sighted enough to see that unless cars are built with a high factor of safety there will inevitably come unwelcome legislation. Too little attention has been paid to the element of safety in the manufacture and construction of motor cars, the sole aim having been to produce a vehicle of high power and speed, which is necessarily antagonistic to safe automobiling. Unless machines are manufactured with a view to making legislation unnecessary it will be found that laws will be passed which will require the manufacturer to turn out an absolutely safe product. Then, again, we may also expect limitations upon speed capability, such, for example, as limiting the gearing.

The status of the automobile manufacturer in relation to those who purchase cars from him and the public involves a confidential relation. Trust and confidence is reposed in one who produces an automobile. He is relied upon to furnish a safe vehicle, one that will not injure those who ride in it under under ordinary use. The manufacturer knows what kind of a product he is turning out. He is aware of the materials and labor which enter into its construction. It is within his power to substitute an inferior material, which can be covered up with paint. He has control over the quality of the labor he employs. The pur-

chaser and the unsuspecting public ordinarily are not technically versed in automobile construction. Those who buy machines are business men, doctors, lawyers, etc., and are compelled to rely wholly upon the word and honor of the one who constructs the machine. The relation is indeed one of trust and confidence. This relation is looked upon by the law with a great deal of jealousy, and protection is afforded the party who places his confidence in another. All contracts between persons holding trust relations are most strongly construed in favor of the fiduciary. The doctrine of *caveat emptor* does not apply in the sale and purchase of an automobile, as a general rule.

To gain the disfavor of the judiciary is to lose one's standing before the courts. To reap the disfavor of the public is to lose business and bring about financial wreck. Are the manufacturers of automobiles in the United States bringing about such a condition? There is a tendency toward it at least. For instance, some of those who purchased commercial cars, being led to believe that the cars would stand up and do the required work, now realize, to their sorrow, that their money has been wasted. All the promises and representations made by the manufacturer are of no avail, since in many cases it would be useless to bring legal proceedings for a breach of warranty or misrepresentation, because of the insolvency of the producer. The result will be that when a reliable manufacturer does come forward with a good car those who have been heretofore bitten will not believe the honest man who has an honest product. All manufacturers will be classed alike by those who have suffered at the hands of one or two. The various schemes and devices which have been resorted to by some manufacturers in order to sell their cars will act like a boomerang, and the comeback will be experienced

not only by the wrongdoers but by those who have exercised legal and honorable conduct.[2]

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2. Trade marks.—With the great variety of automobile supplies and accessories continually being placed upon the market and sold under various trade names, it is not to be wondered at that the trade marks under which certain supplies and accessories are sold should be infringed. An intentional infringement of this character certainly cannot be tolerated for an instant. There are instances, however, where a party or a concern may adopt a trade name or trade mark in ignorance of the fact that another already uses a similar trade name or mark. Of course, under such circumstances the subsequent use of the trade name is illegal, and an injunction may be procured to stop it. The public certainly have a right to fair dealing, and the conduct of a business in such a manner that there is an express or implied representation that the goods or business of one man are the goods or business of another is an illegal depredation not only upon the public but upon the dealer.

In order to obtain the advantage of one's good will and reputation in the conduct of his business, and the qualities of the article which he handles, it has been the custom for a long time to affix to the goods employed in the particular business a name or some particular mark, to distinguish these goods from similar goods produced by others engaged in the same business. These distinguishing marks are called trade marks, and their use has been very general in all countries from ancient times.

A trade mark may be defined as a name, sign, symbol or device which is applied or attrached to the goods offered for sale in the market, so as to distinguish them from other goods sold by others.

A trade mark in order to be valid must be distinctive. It also must have some actual physical connection with the goods. It is sufficient, however, if the mark is affixed either upon the goods themselves or upon a box or wrapper containing them, or in some other way physically attrached to the article. An unlawful business cannot secure a valid trade mark, and a trade mark must not be in itself illegal or immoral or against public policy. No sign or symbol can be used as a valid trade mark which from the fact conveyed by its primary meaning others may employ with equal truth and with equal rights for the same purposes. Arbitrary and fanciful words may constitute a valid technical trade mark, such, for example, as the word "star," as applied to shirts, and "Ideal," as applied to fountain pens, etc.

Newly coined and invented words may also constitute valid trade

In the construction of warranties and representations made by automobile manufacturers the courts of this country will interpret such agreements in favor of the public wherever it is possible. An example of this recently occurred in Missouri, where the Supreme Court held that where a manufacturer sold an automobile to a woman, stating that it could be run by her without manual labor, she had the right to return the automobile and to recover the money paid for it. It has also been held that where an automobile is sold, and it is stated that the machine will be satisfactory to the purchaser, the purchaser may return the vehicle and recover the price if it is not satisfactory to him, notwithstanding the fact that his dissatisfaction is based upon unreasonable grounds. These decisions simply illustrate the attitude which the courts are taking.

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marks. These are frequently found in the automobile trade, and may be protected against infringement.

The color of an article or label, or its form or size, can rarely if ever be protected as a technical trade mark. Neither can the name of the substance out of which it is manufactured be protected.

Words of quality, character, grade, excellence, popularity, processes of manufacture, purpose of use, ingredients, geographical terms, are usually incapable of being protected, unless there is fraud upon the public shown in their use.

Trade marks and trade names are acquired by mere adoption and use. Statutory provisions for the registration of trade marks, as a general rule, apply only to words, marks or symbols which have already become trade marks by adoption and use. The purpose of registry is simply to facilitate the remedy. Registration confers no new rights. The exclusive right to the trade name belongs to the one who was first to appropriate and use it in connection with the goods in question, and not to the inventor or the one who first suggested it. The necessity of use is vital. The popular misapprehension that a trade mark must be registered in order to be protected should be corrected. Those who first use a trade mark may enjoin others who seek to use a similar device, symbol or mark, and who attempt to trade on the good name and good will of another's business.

§ 6. Equipment.

It is the duty of the manufacturer of automobiles to place reliable and safe equipment on their machines. This duty is not only statutory but one imposed by the common law. Over a hundred years ago the common law required all travelers on public highways to have "good tackle," which term included shafts, harnesses, lamps, wheels—in fact almost everything connected with a vehicle which might get out of order by use. Many of the automobile laws of the United States require that machines must be equipped with lamps and good brakes. Some of the laws require mufflers and locking devices. Very little complaint can be made in regard to the quality of the lamps which are carried, except that searchlights should be prohibited in cities, but it is not so much the fault of the manufacturer if improper lamps are used as it is where a car is originally supplied with brakes that are not efficient. Many instances have occurred where automobiles have either run backward or forward down a steep hill because the brakes refused to work. It may be that in some of the cases the refusal of the brakes to do their duty was due to lack of attention, but it would seem from the number of accidents due to trouble with brakes that a manufacturer of automobiles should provide a positive and unfailing stopping contrivance which cannot get out of order by the ordinary use of the machine, and which is to be used only in emergencies. A manufacturer who makes such a device a feature of his car will add to it an element of safety which will make his product marketable beyond other cars which do not possess a similar device. Moreover, those manufacturers who fail to supply this urgent necessity may find themselves involved in litigation sooner or later.

Tires are a part of the equipment of an automobile, and although the manufacturers do not do more than furnish

tires made by other concerns. yet it is their duty to see that proper tires are placed upon cars which they turn out. It is also their duty to see that the tires are safely attached to the wheels. This duty is owed to purchasers of their vehicles and also to the public.

There are some negative obligations on the part of manufacturers; for example, in some of the states excessive noise and odors must not be permiteed. Automobiles must be so constructed as to prevent these annoyances.

"Every motor vehicle while in use on a public highway shall be provided with 'good and efficient brakes,' and also with 'a suitable bell, horn or other signal,'" etc., is the language of the New York motor vehicle law. Similar provisions exist in almost all the other states. Just exactly what constitutes "good and efficient brakes" and a "suitable bell, horn or other signal" may be matters concerning which various opinions may be expressed. The automobile laws demand, under penalty of criminal prosecution, that motor vehicles which are not safely equipped in respect to the particulars mentioned shall not be used on the public highways. The words "good and efficient" and "suitable" must be understood as pertaining to safety, and whether the equipment of an automobile complies with the law constitutes ordinarily a question of fact and not of law. If the equipment is as a matter of fact "good and efficient," then the law is satisfied; but who is to say whether brakes are good and efficient or whether the signal device is suitable? Primarily the manufacturer of the automobile determines the quality and kinds of brakes used, and the manufacturer of horns decides as to the "suitability" of the warning device; but the prohibition of the law is not directed against the manufacturer. The user or driver of the automobile is forbidden to operate the

machine on the public highway unless it is properly equipped. He is responsible. He must see to it that his brakes are "good and efficient," and that they remain so.

Although there may be some uncertainty concerning what constitutes "good and efficient" equipment or "suitable" warning devices, there can be no mistake in regard to the number of efficient brakes required. The law says "brakes." This means more than one device for stopping the machine—not one good brake and one that is out of order. There also can be no question in regard to the necessity of carrying some kind of a warning signal; but the automobilist is not compelled to confine himself to using a horn merely because the horn has been generally adopted. A bell or whistle may be lawfully used. In England it is provided in the Motor Car (Use and Construction) Order of 1904, Article IV, Section 5, that drivers must, whenever necessary, by sounding the bell or other instrument required by the law, "give audible and sufficient warning of the approach or position of the motor car." It is held that ideas may differ considerably as to what warning is "sufficient."

The provision of the *Pennsylvania* automobile act requiring every operator of an automobile to sound the gong or other alarm when approaching a street or road crossing should not be overlooked in considering motor vehicle equipment and the use thereof. When and under what circumstances the alarm should be sounded are matters of sound judgment, and it seems unreasonable to require an alarm to be given upon approaching every country cross-road if the driver can see all around him and there is no traffic on the highway. Much abuse has been made of this provision of the law by constables arresting careful automobilists who were unaware of the legal requirement.

§ 7. Engine not a brake.

Most of the state automobile laws require that each motor vehicle muct be equipped with good and efficient brakes. In one or two of the laws it is provided that there shall be more than one brake. In England the question has arisen if the engine, which is frequently used as a brake, complies with the law, provided only one real brake is on the automobile. It has been held that the engine, under such circumstances, does not constitute a "brake" within the meaning of the requirements. Wilmott v. Southwell, L. T. Rep., Vol. XXV, No. 2, p. 22, Oct. 27, 1908.

§ 8. Public automobiles.

The public automobile is with us, and its use by the public and its equipment are bound to be matters of legislative study sooner or later. There is not so much need of legislation concerning sightseeing automobiles as there is concerning the more speedy vehicles which carry passengers for purposes of transit. The owners of these latter vehicles occupy about the same relation to the traveling public as do the owners of a street railway line.

The public automobile is a common carrier, and as such its proprietors are bound by law to exercise a high degree of care for the safety of their passengers, not only in providing a safe equipment but in furnishing a competent and careful driver. It requires a higher degree of intelligence and knowledge to safely operate a road vehicle than to act as motorman of a street car; the automobile driver may not need to be particularly well-informed concerning the engine and driving mechanism, but must be well up in automobile driving and road management. For instance, he must know how to avoid skidding, especially if he is in charge of a double deck vehicle carrying a considerable number of people on the upper deck. A vehicle of this

character, with its relatively high center of gravity, is liable to capsize if in skidding it strikes a curb or other obstruction with great force. One disadvantage to the traveling public if any injury should be done by a public motor vehicle would arise from the fact that the companies operating such services are usually not very strongly financed, and it might be difficult, to collect any substantial judgment rendered against them.

In regard to the equipment of these vehicles, this should be of the very best. It should be made a misdemeanor for a transportation company to operate cars without systematically inspecting them for wear and breakage. One of these cars which was seen recently standing in New York City waiting for passengers had nothing to hold the road wheels on the axles except a large washer and a split pin. A machine of such construction should not be allowed to carry passengers in public service.

§ 9. Registrations of manufacturers.

In many of the states those wno manufacture automobiles, as well as the dealers, are required to register with the Secretary of State or some other officer, and obtain a license before carrying on business. After having obtained a license it is ordinarily provided that cars of the manufacturer which are not used personally for driving may be operated on the public highways under the manufacturer's number. It is a very general provision that the manufacturer shall register one of each type of car produced by him, and that he can procure duplicate registration seals and tags. Manufacturers' registration fees vary from $5 to $20.

Secret financial irresponsibility.—It is a fraud in law for a person or a corporation to represent himself or itself to be solvent and financially responsible when this is not the case. For a

§ 10. Conclusion.

In conclusion it may be said that no one is more vitally interested in the success of the automobile than the manu-

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corporation to continue making large contracts, assuming heavy responsibilities and assuming guarantees, when the agents of the company know that there is no reasonable hope of being able to fulfill the obligations of the corporation, constitutes deceit. It has long been the settled law that if a man goes into the market and buys goods on credit, knowing at the time that he cannot pay for them, and with no reasonable expectation of future ability to pay for the goods, such a transaction constitutes at least an implied fraud. There is nothing which the law detests more than false and fraudulent representations, and it makes no difference whether the representations are made by expressed statements of facts or implied assertions. A fraud may consist of concealing a fact when it is the duty under the circumstances of a party to speak. A large majority of the frauds which are committed in business consists of concealment of the financial irresponsibility of manufacturers or dealers which is troubling the thinking public.

Why is it that generally the outside world does not hear of an impending failure until the moment it is precipitated? It is not because the financial condition of the concern is unknown and has suddenly come upon the officers of a company as a surprise. Those in control of the affairs of a corporation know the financial condition of the business. Long before an assignment occurs or a petition in bankruptcy is filed corporate officers know when a failure is inevitable, and to continue making contracts and to carry on business under such circumstances constitute as much a representation that the concern is solvent as if an expressed statement is made to that effect.

There are several kinds of frauds recognized by the law. There is first an untrue statement of fact, which if believed by another party and acted upon by him to his detriment is ground for an action for deceit. There is also an implied fraud, which the law raises from the facts and circumstances of the dealing between parties, as, for example, where one person takes undue advantage of another when a fiduciary relation exists between the two. A constructive fraud is a fraud of this nature, though there is some distinction between an implied and a constructive fraud. For a manufacturer to carry on business while financially irresponsible, knowing that there is no reasonable chance of fulfilling contracts and obligations, and taking advantage of the public ignorance of the real state of affairs, constitutes a fraud in law.

facturer. No one can be more interested in sane automobiling, and in the successful elimination, by legislation or otherwise, of the grievous conditions which now exist, notably as to speeding and racing on the public highways and unsafe construction of machines.

CHAPTER XXII.

TAXICAB AND PUBLIC AUTOMOBILE SERVICE.

§ 1. Introductory.

The marked increase in the use of taxicabs and public automobiles calls attention to the legal relations between the owners or operators of these vehicles and their patrons or the public; also the rights and liabilities of persons and companies furnishing to the public transportation by means of motor driven carriages. We had hacks and cabs long before the automobile appeared on the public highways, and inasmuch as the mechanical power is merely a substitute for the animal, it might be said that there is really nothing new to be stated concerning the law governing those who

operate and use such public conveyances, however, there is much existing statutory and common law to be applied, and it is the application of established rules of law that is of interest when considering the various uses of the motor vehicle.

§ 2. Historical.

A taxicab is a hackney carriage. The system of hackney coaches, standing at designated places in the streets of a city, grew out of the necessity of meeting the public demand for means of transit from point to point. This gave rise to a class of men who procured one or more vehicles, according to their means, and plied the streets for hire. It was soon found necessary to place these men under special police regulations, and to assign certain places in the streets where they might stand waiting for customers. Such regulations were necessary for the control of hackmen and for the convenience of the public. Their object was to prevent the hackmen from traveling with empty vehicles, in search of customers, in the streets otherwise sufficiently crowded, and also to prevent their stopping and remaining for any considerable time at inconvenient places; but the great object was to have hacks standing at various points where the public would be most likely to want them, and where they would cause the least inconvenience to other vehicles or injury to the surrounding property.[1]

§ 3. Definitions.

The term "public automobile," as used herein, and as construed in law, means an automobile that is engaged in the service of the public as a common carrier; not one that is used by the government in some one of its branches or

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1. **Historical.**—See Materson v. Short, 34 How. Proc. (N. Y.) 481.

departments, but a motor vehicle which carries the public for hire, like any other common carrier. The term includes taxicabs, automobile bus or stage lines, and sightseeing automobiles. Besides these, there are a number of automobile lines that make a business of transporting freight between points in the United States. We will endeavor to cover the entire field from a legal standpoint, but our discussion will refer principally to the "taxicab."

§ 4. No exclusive right to use the word "taxicab."

Let it be said at the outset that there can be no exclusive proprietary right in the use of the word "taxicab," no matter who coined the word, as has been claimed. The word "taxicab" is public property; it is descriptive of a chattel and is the commonly used name by which automobile hacks possessing fare registering machines are known to the public. Any person or corporation, conducting a hacking business and using taximeters on them, possesses the right to call the vehicles "taxicabs," and advertise the service as conducted by the use of "taxicabs." The fact that the word has been registered as a trademark does not alter the case. With as much reason could a manufacturer of automobile trucks call his vehicles "auto trucks," and claim exclusive rights to the use of the abbreviated word.[2]

§ 5. The taxicab is a hackney coach.

A taxicab, as said before, constitutes a hackney coach. (See Gassenheimer v. District of Columbia, 26 App. Cas.,

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2. Right to use word "taxicab."—No sign, symbol, or form of words can be appropriated as a valid trademark which, from the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose. See vol. 23 Am. & Eng. Encyc. Law (2d ed.), p. 359.

See also the chapter in this book concerning trade marks.

557.) A hackney coach is a term long used in England, meaning a public carriage for hire which stands in the streets and also those kept for hire in stables. The test in determining the character of the particular vehicle engaged in transportation is, whether the carriage is held out for the general accommodation of the public.

Under Section 316 of the ordinances of the city of New York it is provided that a vehicle kept for hire shall be deemed a public hack, and a vehicle intended to seat two persons inside shall be deemed a cab, and a vehicle intended to seat four persons inside shall be deemed a coach; and the term "hackman" shall be deemed to include the owner or driver, or both. This ordinance was approved November 2, 1905, before the present taxicabs came into use in the city of New York. It has been assumed that the local ordinance covers taxicabs and other automobiles engaged in carrying the public, because the definition of a public hack includes any vehicle kept for hire.[3]

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3. Hackney carriages and public conveyances.—In *England* it has been held that an ordinary omnibus running along a fixed route is a hackney carriage, within the meaning of statutes and ordinances (see Hickman v. Birch, 24 Q. B. D. 172). But a hackney coach is not a wagon, according to decisions in *California* and *Nevada* (see Quigley v. Gorham, 5 Cal. 418, 63 Amer. Decisions, 139; Edgecomb v. His Creditors, 19 Nev., 154). It has also been held in the State of *New York* that a hotel omnibus conveying guests to and from a station free of charge is not a "public conveyance." (See City of Oswego v. Collins, 38 Hun. (N. Y.), 17.) In Allen v. Tunbridge, L. R. 6, C. P., 481, it was held that a brougham the owner of which, by agreement with a railway company, attended the company's station for the conveyance of passengers, was a hackney carriage.

In the class of common carriers of passengers are included not only railroads, horse, dummy, electric and cable street railways, and steamboat companies, but proprietors of stage coaches, city omnibus lines, hackmen and ferrymen, including the proprietors of taxicabs and other motor vehicles engaged in public transportation. (See

§ 6. Right to conduct taxicab service.

A private individual or a corporation possessing the authority to do so may establish and maintain a taxicab service in a city upon complying with the license regulation. No special or exclusive franchise is necessary or obtainable under ordinary circumstances. Of course the motor vehicle must comply with the general automobile law, with reference to the registration of the motor cabs, and the drivers who operate the taxicabs must, if required, possess the necessary chauffeur's or driver's license. Where several hundred taxicabs are operated by a company or individual, and automobiles are required to be registered annually, the registration fees necessary to be paid amount to a considerable sum. Under the present motor vehicle law of Pennsylvania automobiles need not be registered, and only drivers are required to register and pay a fee. Several thousand dollars a year might in some instances be saved by having the principal offices of the company in states possessing laws demanding small and permanent license fees from automobile owners. The companies then may go into any state desired under the non-resident exemption provisions of the automobile laws.

§ 7. Municipal regulations.

Since the taxicab is a hackney coach or a vehicle held out for public hire, it is subject to municipal control, compelling the drivers or owners to become licensed to engage in the business which they are carrying on. Under the ordinances of the city of New York, taxicabs and other vehicles engaged in a similar employment must be licensed

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5 Am. & Eng. Encyc. of Law (2d Ed.), 184.) The taxicab is a common carrier, and because it is a common carrier there are important rights and liabilities connected with its operation.

by the owner, and the fee is $2 per vehicle and $1 for the annual renewal of each license. (See Sec. 325, Ordinances of the City of New York). The drivers must also become licensed from the municipal authorities (see Sec. 305). The drivers must also become licensed from the municipal authorities (see Sec. 305). The Board of Aldermen of the city of New York are given power to license public hackmen, cabmen and drivers under Sec. 51 of the New York Charter. The penalty for not having a license when required is a fine of $2 to $25. No driver of a taxicab can obtain a license unless he is a citizen, or has declared his intention to be a citizen. (See Sec. 307.) The following are the vehicle license fees for New York city (see Sec. 308):

Each public hack coach	$3.00
Each public hack cab	2.00
Each special hack coach	5.00
Each special hack cab	3.00

Municipal corporations may, generally speaking, require those engaged in the hacking business to become licensed, and the courts have even gone so far as to hold that if hackmen are without licenses, no recovery can be had for services rendered.[4]

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4. Ferdon v. Cunningham, 20 How Prac. (N. Y.) 154; Best v. Bauder, 29 How. Prac. (N. Y.) 489; Miller v. Burke, 6 Daly (N. Y.) 171; Atlantic City v. Fousler, 56 Atl. Rep. 119.

Charter powers of New York City.—Sec. 51 of the New York charter provides: Subject to the constitution and laws of the State, the board of aldermen shall have power to provide for licensing . . . the business of public hackmen."

This provision of the New York Charter was enacted years ago before automobiles or taxicabs were ever thought of, and whether the general phraseology of the section can be construed to include the automobile is a question which may be subject to some argument. According to the District of Columbia decision hereinafter

§ 8. When city may not demand license fees.

A city cannot impose a license fee upon proprietors and drivers of taxicabs unless taxicabs are fairly included within the terms of the ordinance. For example, if at the time the ordinance was enacted automobiles were not in existence, then it might be held that the local regulation could not have been intended to cover these vehicles. A law imposing a license tax will, in case of doubt, be construed most strongly against the Government and in favor of the citizen. (See Washington Electric Vehicle Transportation Co. v. District of Columbia, 19 App. Cas. (D. C.), 462). In this case it was held that an electric carriage or automobile, although a vehicle, does not belong to the class or classes of vehicles made the subject of the license tax imposed by a law on the proprietors of "hacks, cabs, omnibuses and other vehicles for the transportation of

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mentioned, no license fees can be imposed. There is, however, a more serious objection to the licenses demanded from taxicab drivers and proprietors. These drivers are already licensed and taxed by the State under the motor vehicle law, and it is extremely doubtful if municipalities can demand further licenses and fees. Take the case of the taxicab driver for instance. He must be licensed under the State automobile law and pay a license fee, which is an occupation tax, a tax on his calling.

Application of old statutes.—It is upon the same ground that a toll bridge company cannot charge tolls for automobiles unless the charter or a law authorizes it to do so (see Mallory v. Saratoga Lake Bridge Co., 53 Misc. (N. Y.), 446); that a town is not liable to repair its highways under an old statute providing for carriages, according to a recent Massachusetts decision (see Doherty v. Town of Ayer, 83 N. E. Rep., 677), and one is not obliged to run ahead of a steam automobile to give warning, which is required by an old statute of New York concerning steam carriages. May we not reasonably ask if New York city to-day possesses the authority to license and tax taxicabs? Sec. 51 of the New York Charter provides:

Subject to the constitution and laws of the State, the board of aldermen shall have power to provide for licensing * * * the business of public hackmen.

passengers for hire," not having been known and in use at the time of the passage of the act. This decision is in accordance with the trend of authority on the question of old laws by the use of some general word or term not covering the automobile or other form of vehicle coming into existence or used subsequent to the passage of the law. As said in the District of Columbia case: The terms, "other vehicles," were intended manifestly to embrace only such other vehicles as were *ejusdem generis.*

§ 9. Rights and liabilities of proprietors.

A carrier of passengers by hackney coaches or taxicabs is liable for injuries to a passenger resulting from negligence of the driver. In the absence of an express contract the same liability exists toward a passenger carried gratuitously. So also is a taxicab proprietor liable for the loss of or damage to the contents of a trunk, although trunks are not usually carried as baggage. Of course in the case of personal injuries contributory negligence on the part of the person injured would bar a recovery.

§ 10. Articles left in taxicabs.

Under the municipal ordinances of the city of New York, immediately after a taxicab becomes vacant it is made the duty of the driver to search the vehicle for any articles that might be left by the last occupant of the cab. If any property is found and not claimed it must be taken to the nearest police station within twenty-four hours. There also must be a written notice of the finding of the property forwarded to the Bureau of Licenses at the City Hall. Persons using taxicabs have the right to depend upon these provisions of the local law being complied with, and taxicab proprietors are liable if property thus left behind is not accounted for.

§ 11. Disputes over fares.

In case of a dispute in New York city over the amount of fare to be paid, the passenger is entitled to fair and gentlemanly treatment from the driver. The dispute must be brought before the officer in charge of the nearest police station, excepting disputes where the passengers are freeholders and householders in the city of New York. For a failure to comply with the decision of the officer the delinquent party may be adjudged guilty of disorderly conduct and fined $10, or, not paying the fine, he may be committed to jail for ten days. This law includes drivers as well as passengers, it should be understood.

§ 12. Legal rates of fare.

The rates of fare charged by taxicab proprietors cannot be above the legal rates established by the municipal ordinances, at least not unless the passenger expressly contracts to pay more for the service requested. Under no circumstances can a common carrier charge an unreasonable fare, and there can be no discrimination in the rates charged with reference to persons. The "legal rates" prescribed by law mean that a passenger is not compelled to pay over those rates against his consent. These rates are established for the protection of the public and to prevent abuse. In New York City the rates for general driving are as follows:

CABS.

For one mile, or any part thereof	$0.50
For each additional half mile, or part thereof	.25
For any stop over five minutes in a trip, for every fifteen minutes or fraction thereof	.25

COACHES.

For one mile, or any part thereof	$1.00
For each additional half mile, or any part thereof	.50
For every stop over five minutes in a trip, for every fifteen minutes or fraction thereof	.40

In all park drives in New York one-half hour must be allowed passengers for sight-seeing. Ferriage and bridge tolls must be paid by passengers. The municipal ordinances prescribe the city blocks as the standards for measuring the fares to be charged, which fact would seem to be conclusive on the legal question whether the ordinances can be said to cover taxicabs.

§ 13. Duty to carry applicants.

No licensed hackman shall * * * refuse or neglect to carry any orderly person or persons upon request anywhere in the city, unless previously engaged or unable to do so. No licensed hackman shall carry any other person than the passenger first employing a hack without the consent of said passenger. These are the legal requirements of the New York ordinance. (See Sec. 324.) A failure to comply with these drivers' duties may be punished by a fine.

As a general proposition a common carrier must serve the members of the public without discrimination. Colored persons are entitled to be carried, and, if refused, may recover damages, and drivers refusing to carry colored persons in the city of New York may be fined. Taxicab proprietors may authorize their drivers to expel and refuse to carry persons who are obnoxious, including persons who have contagious diseases, intoxicated and unruly persons. A passenger refusing to pay the legal fare may also be expelled. But legal liability will ensue if a passenger is expelled without lawful cause, and taxicab proprietors are liable for the acts of their chauffeurs in unlawfully excluding or expelling a passenger. Where a passenger may legally be expelled he must be expelled without negligence, and at a proper and safe place. No more force than is necessary should be exercised, and no force at all unless abso-

lutely necessary. An assault is unwarranted, and will authorize a recovery of damages by the person expelled.

§ 14. Operation of vehicles.

Taxicab drivers are required to exercise greater care than the chauffeurs of private automobiles, because they are engaged in a public service, and not only are they required to protect persons on the highway generally, but passengers are entitled to protection by the exercise of care and caution on the part of taxicab chauffeurs. For negligence of the drivers the proprietors of taxicabs are liable, and so are the drivers liable personally to persons negligently injured. All the automobile regulations in regard to stopping upon frightening horses and when accidents happen must be obeyed by drivers.

§ 15. Liability of passengers for negligence.

One who hires a taxicab as a passenger is not liable for the negligent acts of the chauffeur. The passenger does not make the chauffeur his servant or agent by merely becoming a passenger, even though he directs the chauffeur where and how to travel. The chauffeur himself and his employers are alone liable for negligent injuries. But if the chauffeur speeds the cab faster than the law allows, at the request of the passenger, or with his consent, the passenger may be criminally liable for violating the speed limit, according to a recent Massachusetts decision.

Liability to pay fare.—It should be understood that the liability of a passenger to pay the rate named on the taximeter or otherwise posted, arises out of contract. When one engages a taxicab he impliedly agrees to abide by the posted rates provided they do not exceed the legal limit.

In England, in the case of Donovan v. Construction Syndicate, 1 Q. B., 629, Lord Justice Bowen says:

If a man lets out a carriage on hire to another, he in no sense places the driver under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The driver does not become the servant of the person he is driving, and if the driver acts wrongly the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and injury occurs to any one, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of.

In the United States, in the case of Little v. Hackett, 116 U. S., 366, in a luminous opinion by Mr. Justice Field, of the United States Supreme Court, it is held as follows:

A person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence.

Mr. Justice Holmes, of the Supreme Judicial Court of Massachusetts (now a justice of the Supreme Court of the United States), in the case of Driscoll v. Towle, 181 Mass., 416, says:

In cases like the present there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless, in respect to the manner of his driving and the control of his vehicle he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street.

Upon the same theory advanced above, the passenger

cannot be deprived of his right of recovery against any person running into a taxicab, on the ground that the chauffeur caused the injury by his own negligence. Where, for example, a street car is negligently run into a taxicab, one riding in the cab and injured may recover, although the taxicab driver was negligent. (See Eckels v. Muttschall, 82 N. E. Rep., 872; Talotuchin v. Metropolitan St. Ry. Co, 106 S. W. Rep. 548.) [6]

§ 16. Foreign chauffeurs.

Foreign chauffeurs cannot be brought into the United States under contract to drive taxicabs, for to do this would violate the Federal law prohibiting the importation of foreign labor. A chauffeur is engaged in manual labor, although his calling is often spoken of as a profession. (See Smith v. Associated Omnibus Co., Div. C., 916, wherein it is held that a chauffeur is a manual laborer.)

§ 17. Rules and regulations.

Taxicab companies, like other common carriers, have the authority to adopt rules and regulations for the good order of the business, and if reasonable the rules and regulations promulgated will be binding on the public. Such regulations should be posted in a conspicuous place on the vehicles where they can easily be seen by passengers.

§ 18. Regulation of taximeters.

For some time there have been in operation public vehicles with instruments called "taximeters" attached, that com-

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6. See the other chapters of this book discussing the law of the road and the operation of automobiles on the public highways.
See the discussion of imputed negligence elsewhere in this book.

pute the fare to be paid by those carried, according to the distance traveled and the time for which the vehicle is engaged. Presumably these instruments are fairly accurate, although there is no safeguard against "short measure" other than that which may be found in the criminal statutes. A taximeter may be too fast or too slow. If the instrument is too fast then the customer pays too much money for the service according to the contract existing between the carrier and the passenger. If the taximeter is too slow, then the advantage is on the side of the passenger. Who is to determine and who is to know whether these public carriers who are using instruments to measure the fare are making correct charges for transportation?

The taximeter is a new instrument and may be said to be used for the purpose of measuring distance. It may rightfully be called a measure, since its purpose is to measure the distance traveled by a taxicab, upon which measured distance the compensation is to be computed according to the scheduled rates of the operating company. I believe that no one will dispute that the taximeter is in the common and ordinary acceptance of the term a measure of distance, if you please, of linear feet, yards or miles. It is a yardstick in a certain sense. The idea that the taximeter constitutes a measure may strike some as novel, but upon reflection the character of this instrument as a measure will readily be appreciated.

The United States Government has established certain units of measurement. The States of the United States have by legislation also fixed certain units of measure. There are a standard yard, a standard pound for weight, and so on. Realizing that the public is more or less dependent upon the accuracy of the instruments used by various dealers, statutory regulations have been enacted requiring scales and various measures to be inspected annu-

ally, or otherwise to be compared with the standard, accurate units, and to be sealed with the seal of the Government by an official sealer, whose duty it is to see that measures are accurate. In New York, for example, there are state, country, city and town sealers. Sometimes the duty to test scales and measures is imposed upon municipal corporations. The various inspectors and sealers are compelled to give bonds for the faithful discharge of their duties and to perform their work in accordance with the legal requirements of the statutes. The public have a right to the protection which these laws afford.

When one hails a taxicab with the object of engaging it he offers to purchase a ride according to the established tariff as indicated by a *correct* taximeter. He does not agree to pay for a ride according to the reading of an incorrect instrument, no matter whether the inaccuracy is due to mere mistake or actual fraud. The taxicab company sells and the passenger buys a ride. The situation is similar in the case of a person going into a store and buying a pound of butter or so many tons of coal, in which latter cases the scales by which the commodities are weighed must be inspected and sealed every so often by the public sealer. Taximeters are not now inspected, nor are they sealed. There is no supervision over them whatsoever.

It is the duty of inspectors and sealers to inspect and seal all measures, to have a correct standard unit, and to test the various measuring machines or appliances used in dealing with the public. Thus far the public officials charged with this work have failed to perform the duties of their offices with respect to taximeters. It may require some mechanical knowledge to properly inspect a taximeter, and the official may be compelled to have on hand in his office a correct instrument for purposes of testing and comparison. Of course, taximeter manufacturers and taxicab concerns

may make some opposition to placing their instruments under the jurisdiction of the authorities having control over weights and measures. Nevertheless, it is a right belonging to the public which should be enforced.

In case it can be shown that a taximeter is out of order no charge can be made for the service, since the measure is false. If a taximeter is intentionally used which is known to be incorrect, then under the old common law the user may be indicted for using a false measure. Under the statutes of the various states this is also made a crime. To neglect or to refuse to have a measure sealed ordinarily entails a statutory penalty, and to use a measuring instrument which has not been sealed in many jurisdictions constitutes a misdemeanor. It is more than probable that the taximeters used on taxicabs in the cities come within at least the spirit of the provisions of the weights and measures laws.

There may be some question as to whether a taximeter is included within an ordinance, which provides for measures of "things" or "articles" sold. A ride is not looked upon as a chattel, consequently it may not, ordinarily, be called "a thing" or an "article"; however, by a broader construction the term may include "anything tangible or *intangible,*" in which latter case a ride which is purchased is included.

CHAPTER XXIII.

SALE OF AUTOMOBILES—WARRANTIES AND REPRESENTATIONS.

§ 1. Recovery back of price.

The purchaser of an automobile brought an action against the vendor to recover the $685 which he had paid for the machine, showing that the machine was sold under a warranty for a period of one year, that is got out of order shortly after he bought it and that, after repeated unsuccessful attempts to remedy the defects, he sent it to a garage and wrote the vendor that he had returned it under the terms of the agreement. It was held that the evidence justified the jury in finding that there had been a breach of the warranty and that the purchaser was entitled to the return of his money. Beecroft v. Van Schaick, 104 N. Y. Supp. 458.

An automobile was sold under a warranty for one year, and soon after delivery it got out of order. After repeated unsuccessful attempts to remedy the defects, the purchaser

sent it to a garage and wrote the defendant that he returned it under the terms of the agreement. It was held that the buyer could not recover the price that he paid for the machine. Beecroft v. Van Schaick, 104 N. Y. Supp., 458.

§ 2. Automobile unsatisfactory.

A woman, desirous of buying an automobile that she could run without manual labor, purchased a machine from a manufacturer who assured her that a woman could operate it. The contract of sale stipulated that the machine should be satisfactory to her. Under these facts the court held that the woman had the right to return the automobile and to have her money returned if the vehicle was not satisfactory to her. See Walker v. Grout Brothers Automobile Company, 102 S. W. Rep., 25. In this case the St. Louis Court of Appeals, by Judge Bland, said, in differentiating the principle of law to be applied concerning the purchase of various articles: "An automobile is not a work of art, nor a machine about which there can be any very peculiar fancy, or taste, but it is not a common, gross thing, like a road wagon or an ox cart. It is a complicated machine, and cannot be safely run by an inexperienced person, and is not ordinarily run by a lady chauffeur. * * * It seems to us the case comes within that class (of transactions) where the right of decision as to whether or not the article furnished is satisfactory was reserved for the plaintiff."

§ 3. "Seller's talk."

The plaintiff, when purchasing an automobile for about half the price of a new one, was told by the agent that it had been used as a demonstrating car, had been run about 500 miles, and was in first-class condition. The Supreme

Judicial Court of Massachusetts held that not only was there no express warranty, all that was said being "seller's talk," but there was no implied warranty on which recovery could be had for the breaking of the crank shaft after two months' use. Morley v. Consolidated Mfg. Co., 81 N. E. Rep. 993.

§ 4. Recission of contract.

The purchaser of a secondhand automobile is not bound to rescind his contract upon the first discovery of some one imperfection or misrepresentation He is entitled to time for inquiries, experiments and tests. He can waive imperfections or misrepresentations first discovered, and yet afterwards be entitled to rescind upon the discovery of others. Suggestions from the vendor or his agent, to make further inquiries or trials, would also extend the time for rescission. Where an auto is purchased upon the represensation that it is a 1904 model and in perfect working order, and the purchaser afterwards be entitled to rescind upon the discovery the machine, upon trial, proves to be unworkable and is damaged by reason of its imperfections through no fault of the purchaser, the purchaser may rescind his contract and is not liable for the purchase price. To accomplish a rescission of the contract there must be a return of the machine to the vendor. But this is a right which the vendor may waive. And where the vendor gives the purchaser to understand that it would be useless to attempt to return the machine, no return is necessary. The law does not require useless acts or words, and taking the vendor at his word, the purchaser may place the machine where he pleases, at least until the vendor withdraws his refusal to accept it. Pitcher v. Webber, Supreme Judicial Court of Maine, 68 Atl. 593.

§ 5. Measure of damages.

In the case of Isaacs v. Wanamaker, 81 N. E., 763, a machine was purchased under a warranty and the buyer, on receiving the machine at the place of delivery, discovered a breach of the warranty and promptly offered to return the machine and demanded repayment of the price. On the trial of the action brought to recover the purchase price, it was held that the sale was fully executed and was not rescinded, and that the measure of the purchaser's damages was the difference between the value of the machine if it had been as warranted and its actual value.

§ 6. Agencies.

Legally speaking, it is said " an agency, within the meaning of the automobile trade, consists in giving to the agent the exclusive right to purchase for cash from the manufacturer machines at a discount from the list price, and to retail them to customers within specified territory at the full list price. In other words, no commission, as such, is paid to an agent on the sale of a machine, but he has the exclusive right to certain territory and purchases on his own account for cash at a discount of 20 % from the retail list price." See Fredricksen v. Locomobile Co. of America, 111 N. W. Rep. 845. See also Cedar Rapids Auto & Supply Co. v. Jeffery & Co., 116 N. W. Rep. 1054 for construction of agency contract.

§ 7. Commissions.

Where one party requests another to perform valuable services in effecting the sale of an automobile, agreeing " to protect " him if such sale is made, and the influence and solicitation of the party so engaged are the efficient cause

in effecting the sale, such contract should be construed in the light of the surrounding circumstances, and the party should have his commission. Fredricksen v. Locomobile Co. of America, 111 N. W. Rep. 845.

CHAPTER XXIV.

SAFETY OF ROADS FOR AUTOMOBILES.

§ 1. Right to have safe roads.

Equal rights of the motor car on the road having been established, it naturally follows that the automobile is entitled to all the rights pertaining to the suitable condition of the public thoroughfares, including the right to have safe roads, not only for the general use of the highway, but for use of the pneumatic rubber-tired vehicle. The importance of proper road conditions for automobiles cannot be overestimated. If the automobile is to be the predominating vehicle on our public ways, it is necessary that the roads should be so constructed and maintained as to meet the requirements for the safe operation of the motor carriage, and it is a duty resting upon the highway authorities to recognize this fact. The law keeps up with improvement and progress. Those officers who execute the law are bound to perform their duties in accordance with the law and the necessities of the times.

§ 2. Condition of roads.

The question is naturally asked whether roads that are safe and suitable for the metal-tired vehicles are ordinarily

safe for the automobile? If they are, then the law demands nothing more in road construction for the motor vehicle than for the vehicle which is drawn by muscular power. This question is probably one of the least difficult to answer of any concerning the legal rights of motoring. The automobile's novel motive power, communicating force in propelling the machine in a new way and from an unusual direction, and the means of contact with the road constitute the motor vehicle such a radically different means of transportation than the ordinary carriage, that new road conditions are imperatively necessary. Let us consider wherein improved conditions of the road are indispensable. Take for example the motor car's means of contact with the road, the rubber tire. This comparatively new form of tire calls for road construction which will not injure its use, and this requirement is of vital importance, since an injury to the tire may mean substantial injury to the machine and a fatality to the occupants. Not a few cases already have occurred wherein serious accidents resulted from injuries to tires. Suppose a soft spot should be left in a road after digging up the surface, which is not an infrequent condition in many places, and suppose an automobile, traveling at a fair rate of speed, strikes the soft spot with one of the front wheels. Is the result exactly the same, or apt to be so, in the case of a vehicle drawn by an animal? The question does not need argument for its solution. The fact that the power in one case is communicated on the back of the vehicle, and it is on the front in the other situation, renders the liability to danger different, and necessarily such a road less safe for automobiles than other vehicles. This has a direct bearing on the duties of highway authorities and municipal liability for defects in streets.

§ 3. Liability for defective highways.

As bearing on the subject under consideration, an important case recently decided by the Supreme Judicial Court of *Massachusetts* (Baker v. City of Fall River, 72 N. E. Rep. 336) is of great interest. In this case it was decided that under the Massachusetts law providing that highways shall be kept in a reasonably safe condition for travelers with horses, teams, and carriages; an automobile being a vehicle in common use for transporting persons and merchandise, a defect in a street which caused an injury to one operating an automobile, being a defect dangerous to ordinary vehicles, the fact that the conveyance was an automobile did not preclude a recovery against the city. The court said that the law "deals with the state of repairs in which ways are to be kept. In the present case the alleged defect was one which would be dangerous to ordinary vehicles. Therefore, we have no occasion to consider whether roads must be kept in such a state of repair and smoothness that an automobile can go over them with assured safety." It will be seen that the issue intended to be presented herein was not decided by the Massachusetts case, but the statement of the court, in the matter quoted, that the question of safe roads for automobiles was not then presented by the facts before it, suggested grave questions which are certain to arise some time in the near future.

§ 4. Duty of city to light streets.

A recent decision of the Court of Appeals of the State of New York concerning the duty of a municipality to light its streets so as to avoid injury to travelers is of interest and importance. In this case an action for damages was brought as a result of an automobile accident occurring in the night. The automobile ran through a fence and guard at the end of a street, forming a cul de sac, and fell

into a pit. The evidence disclosed that the machine was going 8 or 10 miles an hour; that a similar accident had previously occurred at that place, and had been reported to the city authorities. From the evidence it was left in doubt whether there was sufficient light in the street at the place of the accident to enable a driver exercising reasonable care to discover the fence and guard rail in time to avert an accident. The court held that the case was one for the jury, on the question of the city having performed its duty properly in regard to lighting the street. Judge Werner, the justice writing the opinion of the court, stated the law to be as follows: "* * * * Although it [the city] owed no special duty to those who ride in automobiles, and was not an insurer of the travelers using that street, it was at all times bound to exercise due care to keep the highway reasonably safe and free from dangerous defects (Hunt v. Mayor, etc., of N. Y., 109 N. Y. 134; Hubbell v. City of Yonkers, 104 id., 434). * * * * The streets of a city may be as freely used by those who ride in automobiles as by pedestrians or travelers, and if this cul de sac was likely to be a dangerous place in the night to any class of wayfarers who might be misled into thinking that it would be a continuation of the highway, it should have been so well lighted as to give fair warning that it was merely a cul de sac, or so well guarded as to prevent entrance to the point of danger, for 'a public highway may be used in the darkest night; a night so dark that the keenest and clearest vision may not be able to detect obstructions and defects' (Harris v. Uebelhoer, 75 N. Y., 175)." The decision referred to is Corcoran v. City of New York, *New York Law Journal,* March 27, 1907.

§ 5. Massachusetts decision.

In an action against the town of Ayer, Mass., by a motorist to recover damages for injuries to his car received

while he was attempting to drive it through a road deep with sand, the Supreme Judicial Court of Massachusetts has recently held that the town was not liable. The plaintiff was given a verdict for damages in the local court in which the suit was commenced, but the higher court reversed the decision, holding that, while towns are responsible for such accidents to carriages using their roads, the owner of the automobile must accept the roads as he finds them and cannot claim damages, at least where his auto is injured upon a road over which other vehicles could pass in safety. Doherty v. Town of Ayer, 83 N. E. Rep. 677.

CHAPTER XXV.

AUTOMOBILE LEGISLATION.

§ 1. General considerations.

The legislative regulation of motoring is of vital importance to motor-car owners and operators, not only from the standpoint of keeping within the law, but because every motorist has, or should have, a desire to see that these laws are fair and reasonable in their tendency to protect public safety. Prejudicial or otherwise discriminating legislation against motoring is to be condemned, and every effort should be made in maintaining the freedom of the road and to protect the road rights from measures imposing unreasonable hardships. Taxation of transit should not exist.

§ 2. Fairness of laws.

Legislation on the whole, has been very fair in most of the states in its interest for the public and the motorist.

Only occasionally enactments have seemed to be grossly unreasonable and discriminating. The greatest complaint is concerning the oppressive execution of the laws by unscrupulous officers rather than against the regulations themselves. Some of the law periodicals are advocating more stringent legislation in reference to reckless motoring and the use of motor cars on the streets. One who has studied and compared the legislation of the various states of the Union and of England, and the decisions handed down by the courts, and has considered well the legal status of the motor car, would hesitate long before advising the enactment of drastic legislation which would also unduly restrict the rights of the careful driver.

§ 3. Prohibiting reckless motoring.

Legislation against reckless motoring is, of course, desirable, but the prudent operator should not necessarily be restricted. The "English Motor Car Act" contains interesting provisions in this respect, and that act is worth consideration by the state legislatures as much as many other valuable English statutes that we have adopted. The provision against reckless motoring makes it a criminal offense if any person drives a motor car on a public highway "recklessly or negligently, or at a speed, or in a manner, which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time or which might reasonably be expected to be on the highway." This is a wise and sensible provision. It makes due care the test of all questions of prudent operation, having regard to the nature and condition of the road, the traffic and the circumstances of each particular case. The rate of speed, if with-

in the limit, is immaterial if the motoring is done with prudence. The personal elements of motoring is here regulated, while the machine itself is left unrestricted. This legislation is aimed directly at the driver who has been the direct cause of prejudicial feeling against the motorist. England has in this statute delivered a blow to the careless operator, and has, at the same time, protected the chauffeur who is cautiously mindful of his duties and responsibilities to his employer and to the public. Let the States of the United States study and follow the successful operation of the English enactment. Connecticut has enacted regulations controlling speed somewhat similar in a general way to the provisions in the English law.

§ 4. Uniformity of automobile legislation.

Uniformity of state legislation is always desirable in all branches of the law where the conditions are the same. It is especially necessary where the subject of legislation extends beyond the state's jurisdiction and into and through other states. Motoring is decidedly a subject of this character. Not only is uniform motor-car legislation an advantage to the motorist, but the states would be benefited by it. A state judicial decision construing a provision of the law would have great force in another state as a correct exposition of the regulation, and unnecessary trouble and expense could thereby be avoided. The execution of the statutory provisions would also be more uniform and equitable since each state would determine its procedure from the experience of other states. The legislation as it now exists possesses little uniformity. As pointed out before there are some serious reasons against uniform automobile legislation.

§ 5. Non-resident automobilists.

Some of the states have been solicitous in reference to the motoring privileges of nonresidents. Under the statutary provisions in some of the states, nonresident motorists may operate their machines in the state if the laws of the resident state have been complied with. Some of the states, however, have not had the kindness to extend this hospitality, and require registration and licensing from all. But there are certain privileges, immunities, and rights which the state is bound to afford to the motorist of another state and which the state cannot lawfully or constitutionally deny. The state has no power to enact legislation imposing greater restrictions or burdens on nonresidents than those regulating resident motorists. The nonresident has a right to the equal protection of the laws and cannot be discriminated against by hostile enactments not imposed against the people of the state enacting the legislation. In this matter, however, the states have kept fairly well within the bounds of constitutional authority, except *New Jersey* and many of them have been courteous enough to extend greater privileges to the nonresident than to residents by exempting the former from registration and licensing. A nonresident must carry his home state numbers, etc.

§ 6. What may be expected of future laws.

What may be expected from future automobile legislation? To answer this question the proven defects of existing regulations, the conduct of the motor car operators, and the increase of motor car traffic must be considered. These, however, are not all the matters to be taken into account. We may expect regulations protecting the motorist. It is possible that the manufacture and construction of machines may have to be regulated to some extent.

This will depend, of course, on the standard of construction maintained with a view of protecting the safety of the occupants and others. Questions will have to be solved as they arise, and in order to obtain the most beneficial results for all parties causes and effects should be carefully studied, and both the state and the motorist should co-operate.[1]

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1. **The New York Motor Vehicle Law** was passed really in the interests of motorists. The various rules, regulations and ordinances in the many villages and cities of the State upon the various subjects of licenses, speed and penalties were so numerous, conflicting and confusing that the persons interested in the subject appealed to and succeeded in having passed by the Legislature a general act under which a motorist in any part of the State would know exactly what his restrictions and his liabilities were, and the act expressly repealed all ordinances, rules or regulations theretofore in effect, and permitted local authorities to thereafter pass ordinances, rules or regulations in regard to the speed of motor vehicles on the public highway only under three express conditions: First, that such ordinances, rules or regulations should fix the same speed limitations for all other vehicles; second, that the local authorities should have placed conspicuously on each main public highway, where crossed by the city or village line, and on every main highway, where the rate of speed changes, signs of sufficient size to be easily readable, showing the rate of speed permitted; and third, that such ordinances should fix the penalties for violation thereof similar to and no greater than those fixed by the local authorities for violations of the speed regulations for all other vehicles. Hainer v. Keeper of the Prison, (Appellate Division of the Supreme Court of New York), New York Law Journal, Oct. 31, 1907.

Advertising on public automobiles.—Exterior advertising, although æsthetically offensive, upon the motor vehicles of a corporation organized to operate a public stage or omnibus line is not a public nuisance.

Engaging in such exterior advertising, or granting to others the privilege therefor, by such a corporation, HELD ULTRA VIRES as not necessarily incidental to the purpose of its existence or within the implied authority of its charter.

An ordinance of the City of New York (section 41, chapter 2, article IV, Part II, Code of Ordinances) prohibiting "advertising

§ 7. Construction of statutes.

While the rule of strict construction applies generally to criminal statutes, such as are the various automobile enactments, the excessive strict construction that formerly prevailed has been so modified as to look to the legislative intent when plainly manifested; the courts, on the one hand, refusing to hold those not clearly brought within the scope of the statute, and, on the other hand, refusing, by radical refinement or unreasonable, incongruous construction, to discharge those plainly within its scope.—State v. Goodwin, 82 N. E. Rep. 459.

§ 8. Implied exceptions.

Statutes unrestricted in terms are not infrequently construed to admit of implied exceptions. Kelley v. Killourey, 81 Conn. 320. This is not an automobile case, however, the principle announced is one of great importance in con-

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wagons" in the streets of the Borough of Manhattan, HELD authorized by section 50, Greater New York Charter, empowering the board of aldermen "to regulate the use of the streets * * * by vehicles" * * * and "the exhibition of advertisements or handbills along the streets."

Such ordinances is not unconstitutional as depriving a stage company attempting to engage in exterior advertising of its property without due process of law, or of the equal protection of the laws, or as impairing the obligation of its contracts.

SEMBLE the vehicles of a stage or omnibus company are "wagons" within the meaning of such ordinance.

Where a public corporation shows itself to be engaged in an act unauthorized by law, it is not entitled to an injunction to restrain possible future lawful interference therewith.

An action for an injunction to restrain the city from proceedings to compel the discontinuance of such exterior advertising dismissed upon the merits. See The Fifth Avenue Coach Co. v. The City of New York, N. Y. Law Journal, Jan. 23, 1908.

struing automobile regulations, especially the law of the road.

§ 9. The smoke nuisance.

That the emission of offensive smoke from automobiles, especially in cities and inhabited districts, is a nuisance cannot be disputed. The accompanying odor is not pleasant and may possibly be injurious, if it is constantly present, either to health or vegetation in the parks or country. The detrimental effect upon persons and plant life has not as yet been authoritatively determined, although in France it has been claimed that the fumes coming from the exhausts of automobiles injured the growth of vegetation along the boulevards. Whether this be true or not, the fact that the smoke is offensively unpleasant warrants legislative regulation of the matter. Nuisances have from time to time immemorial been subject to legal control, and the mere fact that conduct is unpleasant, irrespective of injury to either health or property, has constituted cause for controlling it either by legislation or action of the courts. Thus noise may be controlled and unwholesome stenches may be enjoined. It is a matter of record that the courts have issued as many injunctions against the emission of gases from manufacturing establishments which injured vegetation as against any other kind of nuisance. The smoke nuisance resulting from the improper handling of automobiles is on a par with gas nuisances generally, and legislative action is not only proper but legally warranted.

In England the law prohibits the emission of offensive smoke or odors from automobiles, and several automobile drivers have been prosecuted and fined for violating the law. In America we have practically no legislation on the

subject, except the recently passed ordinance of the Park Board of New York city.[2]

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2. For an English case concerning prosecutions for the smoke nuisance caused by an automobile, see Star Omnibus Co., London (Limited) v. Tagg (Div. Ct.)

CHAPTER XXVI.

FEDERAL CONTROL OVER MOTORING.

§ 1. In general.

The question has been raised in the minds of many whether or not the United States government should, to any extent, control the operation of automobiles and seek to take the matter out of the hands of the states. This question naturally arises from a consideration of the adverse attitude which some of the state legislators have taken in reference to the automobile. The advisability of Congress to control interstate motoring does not depend upon any action the state might take in regulating the automobiling within its borders.

§ 2. Powers of state and federal governments.

It is not so much a question whether the United States should control the operation of the motor vehicles as whether the federal government really possesses the power to act in the matter. It must not be forgotten that in this country there are two distinct sovereignties—two governments—that of the state and that of the United States. Each government is distinct and independent of

the other in many matters. There are certain things that the United States government cannot do which affect the state, and there are matters the state has no control over which affect the United States.

§ 3. Regulation of internal matters belongs to state.

The regulation of the use of internal highways is a matter which belongs exclusively to the state government. It is a matter of purely internal concern and comes under the state's power to pass regulations protecting the public from danger in the operation of vehicles on the highways. Over these state internal police matters the United States has no control at all; and in so far as motoring is confined exclusively within the jurisdiction of the state Congress cannot act.

§ 4. Interstate motoring.

Where, however, automobiling is interstate, that is, where the motorist passes from one state into another, the federal government is given jurisdiction over such travel by the United States Constitution not by the commerce clause necessarily. The United States has jurisdiction to control interstate commerce, and interstate commerce possibly may include interstate pleasure travel by means of the motor car but the author doubts this. Action by the United States in respect to interstate motoring, however, would not prevent the states from regulating automobile travel within their own domains. This right is granted the states by the Constitution and could not be taken from them by any act of Congress.

There is a question in regard to the power of Congress to regulate interstate automobiling, and that is, Does interstate travel for pleasure, such as interstate automobiling generally is, constitute interstate commerce within the

meaning of the United States Constitution, granting to Congress the exclusive control thereof? This question leads us to ask what commerce is. Ordinarily commerce consists of "commercial intercourse." It must be conceded that interstate travel for pleasure and recreation does not savor of anything commercial. It is not business. It is pleasure and recreation, and nothing more. Of course, interstate travel carried on by automobiles used for commercial purposes, such, for example, as the public carrying of passengers and goods, without question constitutes interstate commerce. The greater amount of interstate automobile travel, however, is for the purpose of pleasure and recreation. Business and pecuniary gain have no connection with it.

The idea that Congress may possess the power to pass regulations controlling interstate automobiling is not by any means a new one. There can be no question as to Congress' power. Whether the travel be by steam railroad, trolley car, vessel, automobile, bicycle or on foot, if it consists of the passage of either persons, animals or goods from one state into another, across the boundary line of any two states, then the travel may constitute interstate commerce provided there exists a commercial purpose. People who, for commercial gain or commerical purposes, walk across a bridge which spans a river between two states may be said to carry on interstate commerce, and Congress possesses plenary power to regulate this travel. But if a valid, just and non-discriminating law is to be enacted, the form in which the bill is framed and the method of procedure of its supporters are of paramount importance. Direct legislation will not do.

Manifestly the flying of a kite or the throwing of a stone across the boundary of two states would not constitute interstate commerce. The passage of telegraph and tele-

phone messages, however, has been held to come within the commerce clause of the Constitution, and the kind of messages, whether concerning business, pleasure or what not, makes no difference according to the decisions. It must be admitted that in the case of the automobile we have the following elements of interstate commerce, excepting the fifth:

1. A means of travel.
2. Actual travel or traffic.
3. A means of, and actual travel, which will satisfactorily carry and convey people and freight.
4. Interstate travel or traffic.
5. Business or commercial purpose of travel.

Does the purpose or object of all this automobile travel have any bearing on the question as to whether it constitutes commerce? This is the only question which must be decided before Congress' authority to legislate on the subject is established. We will examine, therefore, into the meaning of the term commerce and ascertain if the travel must in some way be connected or related to business, trade or gain.

"Commerce" is defined in the famous case of Gibbons v. Ogden, 22 U. S. (9 Wheat.) to mean *not only traffic* but also intercourse, and it is said in McNaughton Company v. McGirl, 49 Pac. Rep., 651, that *commerce is traffic,* but it is something more—it is intercourse. The transportation of passengers is a part of commerce. Passenger Cases, 48 U. S. (7 How.), 283. *Commerce is traffic,* but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. Chicago & N. W. R. R. Co. v. Fuller, 84 U. S. (17 Wall), 560. The term "commerce" in its broadest acceptation includes *not merely traffic* but the means and vehicles by which it is prosecuted.

Winder v. Caldwell, 55 U. S. (14 How.), 434. The term *embraces all instruments by which commerce may be conducted.* Trademark Cases, 100 U. S., 82. But it is well settled that insurance is not commerce, and logs which are floating down a river uncontrolled are not an element of commerce. Harrigan v. Connecticut River Lumber Company, 129 Mass., 500.

In Pensacola Tel. Company v. Western Union Tel. Company, 96 U. S., 1, we have the following enumeration of agencies of travel which may be engaged in interstate travel, and the enumeration is made in the order of improved means of transit. The court begins with the horse, mentions the stage coach, sailing vessel, steamboat, railroad, and ends with the telegraph. If automobiles had then been in use they might have been included if used commercially.

In view of the recent attempt to have Congress to consider favorably a Federal automobile registration law, the following decision is of interest:

In United States v. Colorado & N. W. R. R., decided by the United States Circuit Court of Appeals, Eighth Circuit (November, 1907, 157 Fed., 321.). The following is from the syllabus by the court:

The safety appliance acts (acts March 2, 1893, chap. 196, 27 Stat., 531, amended by act April 1, 1896, chap. 87, 29 Stat., 85, U. S. Comp. St., 1901, p. 3, 174, and act March 2, 1903, chap. 976, 32 Stat., 103, U. S. Comp. St. Supp., 1907, p. 885), apply to and govern a railroad company engaged in interstate commerce which operates entirely within a single state independently of all other carriers.

Every part of every transportation of articles of commerce in a continuous passage from a commencement in one state to a prescribed destination in another is a transaction of interstate commerce.

Congress may lawfully affect interstate commerce so far as necessary to regulate effectually and completely interstate commerce, because the Constitution reserved to Congress plenary power to regulate interstate and foreign commerce, and the Constitution and the acts of Congress in pursuance thereof are the supreme law of the land.

In Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction, 68 At. Rep. 806, it is said: "While interstate commerce necessarily involves interstate transportation, the converse is not always true. A railroad or ferry company, for example, which transports persons or property from one state to another, is undoubtedly engaged in interstate commerce, and a tax by the state upon owners of vessels or common carriers so transporting persons or property has been held void as a regulation of commerce. On the other hand, transportation may be conducted without constituting commerce or traffic, which has been defined to be the exchange of merchandise between individuals, communities, or countries, whether directly in the form of barter or by the use of money or other medium of exchange. A manufacturer who sends his goods manufactured in Connecticut to his own entry port or store in New York City, transports the products from one state to another, but the transaction by such owner is not of itself, so far as the owner is concerned, interstate commerce in the sense that the City of New York has no power to tax the goods thus stored and awaiting sale in New York, although the merchandise may be intended for a foreign market. The transaction lacks the essential element of trade, namely, sale or exchange.

The Supreme Court of the United States says, concerning the commerce over which the Federal Government has exclusive control:

"Let us inquire what is commerce, the power to regulate which is given to Congress? This question has been fre-

quently propounded in this court, and the answer has been —and no more specific answer could well have been given— that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph—indeed, every species of *commercial* intercourse among the several States—but not that commerce 'completely internal,' which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States. The power to regulate governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution. * * * Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to, or connection with, the commerce regulated."—Per Mr. Justice Harlan, in Adair v. U. S., 28 Supreme Court Reporter, 277, p. 281, decided Jan. 27, 1908.

It is the opinion of the writer that Congress possesses no power to take cognizance of the automobile which is engaged in interstate travel for pleasure merely, by legislation directly regulating that kind of travel. Hon. Henry B. Brown, former Associate Justice of the Supreme Court of the United States, also considers Congress' power in this respect doubtful. In the February, 1908, number of the *Yale Law Journal*, he says, concerning the automobile:

"It is very doubtful * * * Whether the interstate commerce clause of the Constitution extends to private carriages not engaged in regular traffic between the States, and only entering them occasionally and irregularly for the

purposes of pleasure. * * * The practice of rushing to Congress to obtain legislation of doubtful validity is one which ought not to be encouraged, when the States can afford a sufficient remedy."

The writer does not agree with Judge Brown's opinion, which is very broad, but is of the opinion that Congress may regulate interstate automobiling after first assuming jurisdiction over all interstate highways, including all roads leading into them and used for interstate travel. Having first taken jurisdiction of the interstate thoroughfares of travel, Congress may then regulate any kind of travel thereon, no matter if it be travel for pleasure, for to do so would in a logical sense protect the travel on such highways for commercial purposes. This is the foundation of the power of Congress in the matter. Congress may assume exclusive jurisdiction over all interstate public ways, the same as it has done over the waterways of the United States upon which commerce and navigation are carried on. This is the only method of getting at the root of Congress' power to regulate interstate non-commercial travel by means of automobiles.

§ 5. The right of transit.

Since the advent of the new means of transportation, the automobile, pleasure driving has developed wonderfully, throughout the United States. A Saturday or Sunday afternoon drive, which formerly amounted to nothing more extensive than traveling a distance of four or five miles, may now, by use of the motor vehicle, consist of a twenty-five mile ride, and across the line into another state. A whole day's automobile drive might, in some instances, take one into more than one state other than his own.

Distances have been shortened by the motor vehicle, cities brought closer together and touring through the country

necessitating passage over and across several and many States is now prevalent. For an automobilist to suggest a drive between the cities of New York and Philadelphia, for example, would be generally looked upon as a short ride, although the drive requires the use of the highways of three states. Correctly it may be said that automobiling to-day is more *interstate* than purely local within any one particular state's borders. Rhode Island automobilists, probably more than any other citizens, realize this, since little Rhodie has a very small area over which the automobilist can travel. The same situation exists in Delaware. Considering the nature of automobile travel and its distinctive interstate character, it is naturally a question paramount in the minds of motorists as to whether the various states of this Union possess the authority to enact laws which require non-resident automobilists coming into the state to pay a fee which is in the nature of revenue. In other words, can revenue be collected from touring automobilists by the states through which they travel?

United States citizenship.—In considering this question, it must not be forgotten that the United States of America is a nation. It is a country and is sovereign within its limits. It is a distinct government the same as France or Germany. The people of the United States are its citizens. United States citizenship carries with it not only certain duties and responsibilities, but many rights. Some of these rights are inalienable, others are not. It is necessary for us to start, with these ideas in view, in order properly to understand the status of a United States citizen who wishes to travel across the country by means of a private carriage. We are apt to lose sight of the fact that there is a larger and more important government here than that of the state, although a state is sovereign within its proper sphere.

Citizen's right of transit.—The question which we will start with will be confined to mere *transit* from one state to another by a United States or state citizen. Who is there that can deny to the citizen of any state the right to transport himself from one state to the one adjoining? He may either walk, ride behind or on a horse, be carried by an automobile, sailing or power vessel, railroad train and possibly a flying machine, wihout being compelled to pay one penny for the privilege of so doing. It is the citizen's inalienable right to be allowed to enter another state, to choose another domicile, and, if he desires, to constantly pass and re-pass from one state into another. "Liberty" which is guaranteed by the Federal Constitution to the people of the various states not only secures this right, but the general fundamental principles of constitutional government give to the citizen the right of transit from state to state. We will, if you please, confine the above assertion to transit unaccompanied by any contrivance such as the automobile.

Transit of vehicle.—Being convinced that transit of persons cannot be obstructed by the state, let us ask if there can be any restrictions placed upon transit carried on by a mechanical contrivance of admitted dangerous characteristics. At the outset let it be said that the automobile is not dangerous *per se*. This has been held to be the law in several recent cases decided by the highest courts in this country. However, it must be admitted that there are certain dangers connected with the operation of automobiles, which are not experienced in driving horse-drawn vehicles on the public highways. Therefore, the state possesses the authority under its police powers to regulate automobiling, to prescribe speed limits and to require drivers and owners of motor vehicles to become registered or licensed. It is necessary, in order to regulate automobiling, to pay the expenses of the department issuing licenses and registering

drivers and owners of automobiles. These expenses naturally should be met by the class of persons regulated and licensed. No quarrel can be picked with any of the states because the support of the motor vehicle departments is placed upon the shoulders of automobilists. But the amount of the fees charged is limited by law, by the United States Constitution and the common law as found in American judicial decisions.

Limitation on license fees.—It is a well settled principle of the law governing license fees and occupation or privilege taxes that the sum charged for the license must not be unreasonable and so large as to make the act performed virtually prohibited. The rule lays it down that the reasonableness of the sum is to be determined according to what the expenses are incident to issuing licenses and maintaining the department in its activities. If, therefore, the fee charged for registering an automobile or a motor vehicle driver is reasonable according to the standards just mentioned, then it is a just and legal exaction, otherwise it is not.

Just exactly why a $2.00 fee is requisite, and amply sufficient in the State of New York for the registration of an automobile by an owner which gives him a license to drive on the public highways, while a $10.00 annual fee in New Jersey is charged under the same conditions, plus $4.00 every year for the privilege to drive, cannot be explained otherwise than by saying that the New Jersey law is unjust and illegal, considering what the law is in the United States governing the legality of license regulation.

Questions of interstate commerce not in issue.—That the state cannot tax interstate commerce is forever settled; so we need not dwell upon that phase of the question. Moreover, it is extremely doubtful if travel for pleasure is commerce within the meaning of the Federal limitation.

We do not need to consider the commerce feature of interstate travel any longer, and the surprise is great that heretofore the inviolability of the *correlative right of transit* has not been advocated. No matter if the travel is by rail or automobile, interstate transit can no more rightfully be taxed than interstate commerce. Here is a new phase of interstate communication for the judiciary to deal with, yet it is very old, so old that it has nearly been forgotten. We first heard of this right of transit in 1867. Crandall v. Nevada, 6 Wallace (U. S. Rep.) 35.

The case of Crandall v. Nevada, 6 Wallace (United States Reports) 35, held that a state cannot tax the right of transit through the states by the *ordinary means of travel.* The opinion of the Court in this case was written by Mr. Justice Miller, and is in part as follows:

"The people of the United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capitol established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the states and from the people of the states. Here resides the President, directing through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government.

"That government has a right to call to this point any or all of its citizens to aid in its service, as members of the congress, of the courts, of the executive departments, and to

fill all its other offices; *and this right cannot be made to depend upon the pleasure of a state over whose territory they must pass to reach the point where these services must be rendered.*

"The government, also, has its offices of secondary importance in all other parts of the country. On the seacoasts and on the rivers it has its ports of entry. In the interior it has its land offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to close points from all quarters of the nation, *and no power can exist in a state to obstruct this right that would enable it to defeat the purposes for which the government was established.*

"The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any state of the Union.

"If this right is dependent in any sense, however limited, upon the pleasure of a state, the government itself may be overthrown by an obstruction to its exercise * * *

The correlative right of transit.—"But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon the government, or to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has a right to *free access* to its seaports through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, *and this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it.*

"The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the states, as its exercise has affected the functions of the Federal government, has been repeatedly considered by this Court, and the right of the states to impede or embarrass the constitutional operations of that government, *or the rights which its citizens hold under it, has been uniformly denied.*"

In the opinion of the court the famous case of McCulloch v. Maryland, 4 Wheaton (U. S.) 316 was commented on and the remarks of Chief Justice Marshall, "that the power to tax involves the power to destroy" were given prominence. Given the power to tax, the extent is unlimited. If a tax of one dollar is legal, a thousand dollar tax would be lawful.

The Court adopted and approved of the views expressed in the Passenger Cases, as follows:

"Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote states or territories, *is entitled to free access*, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every state in the Union. For all the great purposes for which the Federal government was formed, *we are one people, with one common country.*"

"We are citizens of the United States, and as members of the same community, *must have the right to pass and repass through every part of it without interruption*, as freely as in our own states."

"And a tax imposed by a state for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other states as members of the Union, and with the objects which that Union was intended to attain, *such a*

power in the states could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

The automobile is an ordinary mode of travel.—The automobile is now a common and ordinary mode of interstate travel. There can be no question about this. Crandall v. Nevada, it will be particularly noticed, held that the state cannot tax transit carried on by the *ordinary modes of travel.* Interstate automobile travel clearly comes within the ruling of the court in this case; consequently it cannot constitutionally be taxed.

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